Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GERALD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. DE NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP., ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and ASTORIA FEDERAL SAVINGS & LOAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a merger transaction approved by shareholders after a false and misleading proxy solicitation. The questions presented are:

1. Whether the court of appeals erred and acted contrary to the principle established in *Mills v. Electric-Auto-Lite Co.*, 396 U.S. 375 (1970) when, *sua sponte*, it dismissed petitioners' case for want of causation because it believed that shareholders would have voted to approve even had they been told the truth concerning the representations which the court below assumed to be materially misleading.

2. Whether the court of appeals erred in dismissing petitioners' claim of a false and misleading fairness opinion by an investment banking firm even though petitioners alleged serious omissions relating to the integrity of the process by which the proposed merger was submitted to the shareholders.

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OPINION BELOW

Petitioners respectfully request a Writ of Certiorari issue to review the judgment and decision in this action of the United States Court of Appeals for the Second Circuit entered on July 10, 2000, as amended August 24, 2000, and reported at 218 F.3d 144 (2d Cir. 2000) (1a[1]) affirming, on other grounds, the unreported decision of the United States District Court, Eastern District of New York, granting respondents' motion to dismiss petitioners' federal claims with prejudice (18a). The opinion was amended after a timely petition for rehearing, which was denied on September 26, 2000 (45a).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the denial of the petition for rehearing, pursuant to Supreme Court Rule 13.3. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106. Under 28 U.S.C. § 1331 and § 27 of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78aa, original federal jurisdiction is vested in the district courts of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), provides in pertinent part:

> It shall be unlawful for any person, by the use of the mails or by any means or

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[1] Parenthetical references to a number followed by a lowercase "a" (*e.g.* "1a") are to the page(s) of the documents in the attached appendix required by S.Ct. R. 14(i).

> instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered pursuant to . . . this title.

Securities Exchange Commission Rule14a-9, 17 C.F.R. §240.14a-9(a), provides in pertinent part:

> No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

STATEMENT OF THE CASE

1. THE NEGOTIATIONS LEADING TO THE MERGER BETWEEN THE GREATER AND ASTORIA

This case is a classic story of the denial of fair corporate suffrage and the right of shareholders to have an effective voice in a merger transaction. As alleged in petitioners' corrected second amended class action complaint (47a) -- which has been and must be taken as true for purposes of this proceeding -- officials of The Greater New York Savings Bank ("The Greater") and Astoria Financial Corporation ("Astoria") began merger negotiations in early

1997. Shortly thereafter, a senior executive of North Fork Bancorporation, Inc. ("North Fork") contacted officials at The Greater and expressed interest in acquiring The Greater, to which The Greater showed no interest. Discussions between The Greater and Astoria continued, with Astoria eventually given access to The Greater's books and records for its due diligence investigation.[2]

In March 1997, North Fork's chief executive officer, John Kanas, called his counterpart at The Greater and told him that North Fork had acquired a substantial equity stake in The Greater and wished to engage in serious merger discussions. The Greater's official declined this second invitation. Contrary to the representations made to its shareholders but consistent with its refusal to give serious consideration to any bid by or merger with North Fork, The Greater stated this time that it was not planning to merge and did not wish to talk to North Fork under any circumstances (58a ¶ 28). However, The Greater's board discussed North Fork's interest as well as Astoria's among themselves, and authorized continued negotiations with Astoria only.

North Fork persisted in communicating its interest to The Greater, repeatedly stressing its desire to make an acceptable bid to The Greater's board after it conducted its own due diligence. A representative of the investment banker for The Greater, Sandler O'Neill & Partners, L.P. ("Sandler O'Neill"), thereupon engaged in telephone conversations with North Fork, purporting to seek a definitive bid. But North Fork was still denied any opportunity to do due diligence.

As discussions between The Greater and Astoria moved toward closure, North Fork made a stock-for-stock offer valued at approximately $19 per share, even without

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[2] "Due diligence" is a term of art referring to the important ability of each side in a merger negotiation to inspect the books, records and other financial and business materials of the other to assure themselves that the transaction is worth pursuing on the terms being considered.

due diligence, and demanded the opportunity to address The Greater's board concerning its proposal (61a). After being denied a direct appeal to The Greater's board, which refused to consider any offer other than Astoria's, North Fork stated clearly that it might well be willing to raise the price after due diligence, and indicated that it was ready to work throughout the coming holiday weekend to complete the process quickly. Upon being pressed to increase its bid further, Kanas assured The Greater's investment banker that North Fork's bid would not go down after, but could not be increased before, being afforded due diligence. At this point, The Greater's investment banker asked North Fork's Kanas whether The Greater's chief executive, Gerald Keegan, would continue to play a major role in the merged enterprise were a deal between The Greater and North Fork to go forward. Kanas said no (62a).

While denying North Fork a fair opportunity to compete, The Greater and its advisors did pass on information about North Fork's bid to Astoria, pressing Astoria to raise its bid in response. On March 27, Astoria made a proposal for a stock and cash acquisition valued at $18.94. Two days later, The Greater and Astoria agreed to a merger at that price, with "lock-up" provisions designed to protect the deal from external competition. As part of the merger agreement with Astoria, Keegan and The Greater's board members were given lucrative contracts with the new enterprise. The deal was publicly announced on March 31, 1997.

Under New York Banking Law § 601(2) (McKinney's 1971 & Supp. 2000), shareholders of The Greater had to approve the proposed transaction by a two-thirds vote for it to become effective. A proxy statement was thus distributed in June 1997, seeking shareholder approval. The proxy statement sent to The Greater's shareholders described the specific terms of the transaction. It included a recommendation by The Greater's board that shareholders vote in favor of the transaction and an opinion by Sandler

O'Neill that the transaction was "fair, from a financial point of view."

The proxy statement also purported to describe the history of the negotiation process, including disclosure that an "Other Organization" had expressed an interest in making a proposal. After an abridged, incomplete and misleading recitation of the background facts regarding these discussions, the proxy statement represents the following:

> As part of [The Greater] Board's deliberations, it instructed Sandler O'Neill to contact the Other Organization to inquire as to the consideration it would be willing to provide to [The Greater's] shareholders in a combination with [The Greater] and its ability to move expeditiously to sign a definitive agreement with respect to such a transaction. The Other Organization responded with a proposal that involved a combination conditioned on "pooling of interests" accounting treatment and consideration consisting of a fixed exchange ratio of the Other Organization's common stock that had a value of $18.53 per share. . . . *Sandler O'Neill asked the Other Organization to increase its price and it declined to do so.* (7a) (emphasis added).

Shareholders of both The Greater and Astoria voted to approve the transaction in August, 1997.

2. PETITIONERS' LAWSUIT

Petitioners filed this lawsuit on July 18, 1997, claiming that the proxy statement was false and misleading in violation of Section 14(a) and Rule 14a-9 promulgated

thereunder.[3] The heart of petitioners' claim was that the proxy statement grossly misrepresented North Fork's willingness to bid by failing to disclose that it was denied the same opportunity as Astoria to do due diligence expeditiously and to make a presentation to The Greater's board and by failing to disclose that *any* bid by North Fork would have been rejected. North Fork did not "decline" to raise its price: it stated throughout that it was ready and willing to consider raising its price if given reasonable access to The Greater's books and records. Other material omissions included the failure to acknowledge that North Fork had a sizable stake in The Greater; that it had in fact made a better and higher offer than Astoria by some $4.6 million when carefully scrutinized, even without due diligence; and -- importantly -- that North Fork's proposal, in contrast to Astoria's, offered no continuing role for The Greater's incumbent management. This latter fact, coupled with a full and complete understanding of the history of the negotiations, would have allowed The Greater's shareholders to infer that The Greater's management had skewed the negotiations in Astoria's favor for self-serving reasons.

These claims notwithstanding, the district court denied petitioners' motion for a preliminary injunction to block the merger. *Minzer v. Keegan*, 1997 U.S. Dist. LEXIS 16445 (E.D.N.Y., Sept. 22, 1997). Subsequently, the district court dismissed petitioners' case for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Minzer v. Keegan*, No. 97-CV-4077 (E.D.N.Y., June 1, 1998). Petitioners then amended their complaint, but the district court once again granted defendants' motion to dismiss. *Minzer v. Keegan*, No. 97-CV-4077 (E.D.N.Y., Jan. 25, 1999)(18a). The essence of the district court's two decisions was that the proxy statement distributed by The Greater was not *materially* misleading. Among other things,

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[3] Pendent state claims based on breach of fiduciary duty were also included.

the district court found the evidence of North Fork's interest insignificant absent some "assurance" that it would have made a higher bid than Astoria after due diligence.

3. THE APPEAL AND THE SECOND CIRCUIT'S DECISION

Petitioners appealed the district court's decision to the United States Court of Appeals for the Second Circuit. Petitioners argued that the district court erred in viewing the alleged misrepresentations and omissions as immaterial. Under this Court's test in *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Petitioners argued that a reasonable shareholder of The Greater would surely consider The Greater's denial of due diligence to North Fork, its apparently superior offer, and the evidence of management's self-interested bias in favor of Astoria to be "important." At the very least, this claim presented a triable issue of fact inappropriate for disposition on a motion to dismiss.

During oral argument, after counsel for the outside directors of The Greater represented that any bid by North Fork would have been rejected because The Greater was for sale only to Astoria, Chief Judge Winter agreed with petitioners that the proxy statement seemed to be materially misleading. However, he raised an issue that had not been invoked by defendants or the district court or briefed on appeal: whether petitioners' complaint should fail on the separate ground that shareholders were no worse off than if the truth would have been disclosed and they had no choice but to vote for the transaction.

The Second Circuit's decision was issued on July 10, 2000. In it, as foreshadowed at oral argument, the court assumed that The Greater's proxy statement *was* materially misleading. However, it affirmed the district court's dismissal on causation grounds: "We affirm the dismissal of

the federal claim on the ground that the allegedly material omissions in the proxy statement would not have induced any reasonable investor to be less likely to approve the objected-to merger. There was, therefore, no causal link between the omissions and any harm resulting from approval of the merger." 218 F.3d at 145 (2a). In essence, the court concluded that since The Greater's management was opposed, for whatever reason, to a merger with North Fork on any terms, The Greater's shareholders had no realistic hope of a better deal. Rationally, then, they would have voted to approve the Astoria deal because it was the only one The Greater's management had any interest in, and was better than nothing. The court used this logic to affirm dismissal with respect to the alleged omissions, *id.* at 149-51 (9a-13a), as well as petitioners' claim that the recommendation of The Greater's board of directors was misleading for omitting the same information. *Id.* at 151-52 (15a-16a). With respect to one other claim by petitioners -- that the Sandler O'Neill fairness opinion was misleading because of the alleged omissions -- the court held that petitioners failed to offer particularized facts to show why the merger was unfair from a financial point of view. *Id.* at 151 (13a-15a).

4. THE PETITION FOR REHEARING

Petitioners expeditiously moved for rehearing. The primary argument was that the court's holding was squarely inconsistent with this Court's decision in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which held that a reviewing court in a case under Section 14(a) and Rule 14a-9 is *not* to make its own judgments of how shareholders would have voted in determining whether alleged falsity in a proxy solicitation is actionable. Rather, *Mills* establishes that, so

long as shareholder votes are an "essential link"[4] in the validity of the underlying transaction, causation is presumed upon a finding that the solicitation was materially false or misleading. The court of appeals' original opinion had contained no reference whatsoever to *Mills*.

On August 24, 2000, the court of appeals amended its opinion by adding a second footnote, stating that it is aware of what *Mills* says. "However, the context in which [the statement of the rule in *Mills*] was made and the subsequent decision in *Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083 (1991), make it clear that the Court was only relieving plaintiffs of the difficult burden of proving that, properly informed, shareholders would have defeated the transaction in question. The Court did not intend to provide a windfall to plaintiffs suing over an omission that, if rectified, would not cause shareholders to be any less likely to approve the transaction." 218 F.3d at 149 n.2 (16a-17a). The petition for rehearing was denied on September 26, 2000 (45a).

This petition for writ of certiorari is based primarily on the court of appeals' palpable and belated error in interpreting and applying *Mills*.

REASONS FOR GRANTING THE WRIT

Section 14(a) and Rule 14a-9 set forth a bedrock rule of corporate governance: When shareholders of public corporations are asked to vote by proxy, they are entitled to the truth about the matter before them. In words that have echoed repeatedly in this Court's decisions construing Section 14(a),[5] Congress expressed the belief that "[f]air

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[4] This is not contested here. As pointed out below, the affirmative vote of some 75% of The Greater's public shareholders was necessary for the merger to be legally valid.

[5] This Court has to date interpreted Section 14(a) and Rule 14a-9 in four cases: *J.I. Case v. Borak*, 377 U.S. 426 (1964)(recognizing an implied private right of action to enforce Section 14(a)); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)(establishing causation standard); *TSC*

corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13. Section 14(a) promotes "the free exercise of the voting rights of stockholders" by requiring an "explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.*; S. Rep. No. 792, 73d Cong., 2d Sess. 12. In dismissing petitioners' case notwithstanding the assumption that The Greater's proxy statement was materially misleading, the decision of the court of appeals below deprived The Greater's shareholders of that right. If allowed to stand, it threatens to undermine the well-functioning federal system of corporate suffrage as applied to merger and acquisition transactions that has developed under this Court's guidance.

1. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THIS COURT'S HOLDING IN *MILLS V. ELECTRIC AUTO-LITE CO.*

The court of appeals assumed that the alleged omissions in The Greater's proxy statement were material. 218 F.3d at 149 (10a).[6] It affirmed dismissal, however,

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Industries Inc. v. Northway, Inc., 426 U.S. 438 (1976)(establishing standard for materiality); and *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991)(causation and materiality standards clarified).

[6] Petitioners submit that the court wisely declined to affirm the dismissal on materiality grounds on the circumstances pled here. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries*, 426 U.S. 438, 439 (1976). The inquiry is contextual, with its focus on whether "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* As is plainly evident from the proxy statement here, respondents represented that there were two relatively equal, competing offers being genuinely entertained by The Greater's board of directors and that the board chose the better bid of the two. As alleged in the complaint, however, the truth is the opposite. The board

because it believed that The Greater's shareholders would still have voted to approve the merger with Astoria had there been no misrepresentation. It reasoned that even if the shareholders disapproved of the way management had imperiously brushed off North Fork, they had no way of forcing management to reconsider. The Astoria deal was better than no deal at all, according to the court, and hence they would have voted in favor of it, if reluctantly. As a result, causation was lacking.

There are many flaws in this logic. But most profoundly, it is an approach to causation that this Court rejected long ago in what is widely considered the most important precedent in the jurisprudence of federal proxy regulation, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Like each of this Court's Section 14(a) decisions, *Mills* dealt with a merger transaction submitted for shareholder approval. The allegation was that the proxy statement concealed from the shareholder a parent company's effective domination of both parties to the proposed transaction. In the ensuing litigation, the Seventh Circuit affirmed the district court's finding of a material omission. 403 F.2d 429 (7th Cir. 1968). But it ruled that it was necessary to inquire separately into causation: whether shareholders would have voted to approve the merger had the

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never considered a merger with North Fork as equivalent to a merger with Astoria. In fact, the board was loathe to merge with North Fork even if its offer for The Greater would be far superior to that of Astoria, which, in truth, it was. Under these circumstances, there is a strong case for materiality. At the very least, it should not have been taken away from the jury because it is *not* so "obviously" unimportant to shareholders that "reasonable minds cannot differ on the question of materiality." *Id.* at 450; *see also*, *McCormick v. Fund American Cos., Inc.*, 26 F.3d 869, 879 (9th Cir. 1994) (holding that basic information concerning the identity and wherewithal of a bidder's interest in the target are material facts under the circumstances). Nonetheless, because the court of appeals has not passed on this issue, we believe that it may well be appropriate for that court to address the issue on remand should this Court grant the writ of certiorari and reverse the lower court's causation holding.

truth been told. Conceding that it could not practicably do this by actual inquiry into the decisions of thousands of individual shareholders, the Seventh Circuit held that there should be a determination of whether the transaction was fair. If it was fair, the court reasoned, it could infer that a majority would have voted for the transaction anyway and causation would be lacking. *Id.* at 436.

This Court reversed. Justice Harlan's famous opinion established the fundamental principle that shareholders have a right to the truth and a right to make their *own* determination of whether to vote to approve or not. The Seventh Circuit thus erred in creating an approach whereby "[a] judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders." 396 U.S. at 381. This led the Court to adopt a simple and straightforward causation rule:

> Where the misstatement or omission in a proxy statement has been shown to be 'material,' as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.... There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This

> objective test will avoid the impracticalities of determining how many votes were affected, and by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

Id. at 384-85. *Mills* thus establishes a presumption of causation so long as the misinformed shareholder votes were an "essential link" in the validity of the transaction.[7] The question of the fairness of the misrepresented transaction, and predictions as to what would have happened had the truth been told, is one for the *remedies* phase of the case, but not before. *Id.* at 386 ("In devising retrospective relief for violation of the proxy rules, the federal courts should consider the same factors that would govern the relief granted for any similar illegality or fraud. One important factor may be the fairness of the terms of the merger").

What the court of appeals did here – imagining that the Astoria transaction was such that The Greater's shareholders would have voted for it anyway, and thus finding no causation – is exactly what the Seventh Circuit called for in *Mills*, and fails for the same reason. There is no difference between arguing that causation is lacking because a merger is fair notwithstanding undisclosed conflicts, as the Seventh Circuit posited, and arguing that causation is lacking because notwithstanding the misrepresentation, the merger being offered was better than any alternative for which shareholders could expect, as the Second Circuit did here.

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[7] This presumption is so clearly articulated in *Mills* that it has been described as "unrebuttable." IX Loss & Seligman, Securities Regulation 4356 n.374 (3d ed. 1992). *See also Howing Co. v. Nationwide Corp.*, 972 F.2d 700. 707 (6th Cir. 1992), *cert. den.*, 507 U.S. 1004 (1993); *Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1120 (4th Cir. 1989), *rev'd on other grounds*, 501 U.S. 1082 (1991).

Both rest on a dubious judicial prediction of how shareholders would vote in the face of adverse circumstances, an approach this Court squarely rejected when it reversed the Seventh Circuit. Shareholders have a right to decide for themselves, fully informed, rather than have a reviewing court "bypass" their franchise by making an *ad hoc* judgment of how the vote would have come out. 396 U.S. at 381 ("The decision below, by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would allow the stockholders to be bypassed. . .").

Close examination of the facts of *Mills* underscores just how clearly this Court's decision precludes the kind of determination made by the court of appeals here. The transaction in *Mills* involved a merger between Electric Auto-Lite and Mergenthaler, which owned approximately 54% of Auto-Lite's stock. The material misrepresentation in the proxy statement was the failure to disclose that Mergenthaler appointed and dominated the entire Auto-Lite board of directors, who were recommending the transaction. 396 U.S. at 378. Given Mergenthaler's domination, it would be hard to imagine that Auto-Lite's shareholders could have expected any better deal to be forthcoming had the truth been told, especially since Mergenthaler already had most of the two-thirds vote needed to approve any merger. The factual inference of lack of causation was, if anything, stronger in *Mills* than it is in the present case, as we discuss below. Yet this Court refused to permit that kind of inference even then.

The court of appeals below did not make any reference to *Mills* in the opinion it originally issued. Upon being advised on petition for rehearing of its apparent disregard of this Court's controlling authority, it amended the opinion by adding an explanatory second footnote. This footnote states that *Mills* in "context" and this Court's subsequent opinion in *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991), support its holding. The court went on to add that this Court's precedent "did not intend to provide a windfall to plaintiffs suing over an omission that, if rectified,

would not cause shareholders to be any less likely to approve the transaction."

We discuss *Virginia Bankshares* below, and show that it offers absolutely nothing to support the lower court's curious logic. As to *Mills'* "context," the point flies in the face of this Court's teaching. Without qualification, *Mills* rejected the idea that the reviewing court should make its own merits-based determination of how shareholders would have voted in determining whether there was a violation of Section 14(a) in the first place. As this Court said, a materially misleading solicitation of proxies thwarts "the informed decision at which [Section 14(a)] aims, regardless of whether the terms of the merger were such that a reasonable stockholder would have approved the transaction after more careful analysis." 396 U.S. at 384 n.6. Allowing this case to go forward under the *Mills* presumption is a vindication of shareholders' rights, not a "windfall."

2. NOTHING IN *VIRGINIA BANKSHARES V. SANDBERG* CHANGES THE *MILLS* PRESUMPTION OR JUSTIFIES DISMISSAL OF THIS CASE

The lower court's other cited justification for dismissal on causation grounds was a reference to this Court's refinement of *Mills* in *Virginia Bankshares, Inc. v. Sandberg*. *Mills* expressly left open the question of whether a claim of proxy fraud could succeed where the public shareholders' votes are unnecessary for the validity of the transaction (*e.g.*, where a controlling shareholder has enough votes to predetermine the outcome of the election, so that a proxy solicitation is unnecessary).

This Court resolved the question in *Virginia Bankshares*. There, the parent company owned 85% of the stock of First American Bank, more than enough to guarantee approval of its "freeze out" merger with Virginia Bankshares. Nonetheless, proxies were solicited from all shareholders. This Court held that causation should not be presumed in

such a situation even if the solicitation was misleading. Unless, perhaps, shareholders could show some other harm flowing from the misrepresentation or omission – such as the loss of some state law remedy as a result of being lulled into complacency – the causal link is not present. The Court's reasoning was an extension of *Mills*, echoing its emphasis on the importance of shareholder suffrage but making the logical point that a duty of candor has less usefulness if the shareholder vote does not matter in the first place. Under this limited circumstance, the Court expressed discomfort with expanding the cause of action under Section 14(a). *Id.* at 1104. Nowhere in its discussion did this Court say that the proxy was not actionable merely because the transaction would have occurred even if the truth was told, as the lower court concluded here, *see* 218 F.3d at 150 (11a).

In the instant case, of course, the shareholders' votes *were* an essential link to the completion of the transaction. In fact, of the two-thirds vote required by law to carry the merger transaction between The Greater and Astoria, more than 75% was needed from the public shareholders. Moreover, a state remedy was allegedly lost as well.[8] Given these differences, *Virginia Bankshares* says nothing at all, in holding or dicta, to support the ruling of the court of appeals. With all due respect to the court below, there is no plausible analogy between the situation where votes are legally irrelevant and where votes, in the court's judgment, would have come out the same regardless of the truth. The latter circumstance is still controlled by *Mills'* clear and unambiguous holding. *See, e.g., Koppel v. 4987 Corp.*, 167

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[8] In its opinion, the court below inexplicably rejected any alternative grounds for causation by saying that "appellants have not alleged that the omissions caused them to lose state court rights." This is simply wrong. Petitioners claimed that the misleading proxy solicitation led absent class members to forego their right to seek an appraisal of their shares. Lower courts in the aftermath of *Virginia Bankshares* have accepted this line of reasoning. *See, e.g., Wilson v. Great American Industries Inc.*, 979 F.2d 924 (2d Cir. 1992).

F.3d 125, 137 (2d Cir. 1999)(observing that *Virginia Bankshares* left untouched *Mills'* presumption of causation "when shareholder approval was necessary for a company to complete an allegedly unfavorable transaction").

3. THE "NO CAUSATION" INFERENCE DRAWN BY THE COURT OF APPEALS IS FACTUALLY QUESTIONABLE AS WELL AS LEGALLY UNJUSTIFIABLE

We believe that this petition should be granted simply because of the violence the ruling of the court below does to *Mills* and Section 14(a). But we submit also that the court's determination that The Greater's shareholders would have voted for the Astoria merger even knowing the truth is itself questionable, and illustrates the dangers, foreseen by this Court in *Mills*, of allowing *ad hoc* judicial review to substitute for the shareholders' own informed decision-making.

Because the motion determination being appealed was directed at the pleading, no evidentiary record was properly before the court on the issue of the desirability of the Astoria proposal. Although the district court's dismissal was based on materiality, not causation, the court of appeals assumed materiality and affirmed the dismissal solely for want of causation. The court simply drew its inference of lack of causation from the fact that the Astoria proposal was at a premium above market price, and that even had The Greater's shareholders wished to pursue the alternative transaction with North Fork, they could not have forced management to agree. In support, it surveyed New York corporation law to suggest that management clearly had the upper hand vis-à-vis shareholders regarding any proposed transactions.

But even if this is so, that does not mean that shareholder voting rights would be futile here. *See Mills*, 396 U.S. at 382 n.5 ("There is no justification for presuming that the shareholders of every corporation are willing to accept

any and every fair merger offer put before them. . ."). Had the truth been told fully, so that shareholders could appreciate the seriousness of North Fork's interest in a superior bid and the apparent selfishness of The Greater's management in denying North Fork a fair right to compete, many might well have chosen to vote no. That is the power state law clearly affords in settings such as this specifically to provide a check on managerial overreaching, and the message has not been lost on the investor community. Were even a significant percentage to threaten to do so (especially if coupled with threats to seek appraisal), Astoria might have raised further the consideration it was willing to offer. Shareholder rejection of the Astoria proposal, or even the threat of it happening, might also have emboldened North Fork to launch a hostile tender offer, by-passing management's opposition by going directly to The Greater's shareholders – perhaps seeking their proxies as well to oust The Greater's incumbent board.[9]

We have no way of knowing for sure what would have happened had The Greater complied with Section 14(a) and told its shareholders the whole truth. But that is precisely the point. The court of appeals – without the aid of any record on the issue – made up its own mind on what would have happened, and thereby absolved The Greater of legal responsibility. *Mills*, however, demands a different process. The Greater's shareholders were deprived of the truth concerning material facts. That in and of itself establishes a

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[9] As the court below said, The Greater's management would no doubt have mounted its defenses, 218 F.3d at 150 (12a). Who would win this fight is less clear than the court indicated, however. State courts have shown a willingness to intervene when they sense that management has selfishly placed its thumb on the scale to reject a competing bid simply because they find another transaction more appealing. *See Paramount Comm. Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009 (1997). New York law is largely undeveloped on this issue.

violation of Section 14(a). Whether and how to wrestle with the fact-intensive "what if they had been told the truth" question will no doubt receive due consideration in the district court insofar as it relates to the remedies that petitioners seek. Speculating about it now, as did the court below, was premature, unfair, and violated this Court's decision in *Mills*.

4. GRANTING THE PETITION AND REVERSING THE DECISION OF THE COURT BELOW IS NECESSARY TO PROTECT THE EFFICACY OF THE CONGRESSIONALLY-CREATED SYSTEM OF FAIR CORPORATE SUFFRAGE

The decision of the court below is a novel one that upsets more than thirty years of settled case law. Without exception, *Mills* has been construed as affording shareholders a presumption of reliance and causation once they have demonstrated a material misrepresentation or omission in a proxy solicitation, so long as their votes were necessary to effectuate the transaction. Now, that predictability is lost, the case law confused, and the potential for mischief considerable.

The danger posed to the Congressional purpose of fair corporate suffrage by the ruling below is plain. Those who solicit proxies are invited to skirt the truth and then demand absolution on grounds that shareholders are too powerless to force anything better than what was being offered to them. The beneficial deterrence against proxy fraud that Justice Harlan's opinion in *Mills* foresaw from a clear and unambiguous presumption of causation is undercut. 396 U.S. at 382 ("The risk that [shareholders] would be unable to rebut the corporation's evidence of the fairness of the proposal, and thus to establish their cause of action, would be bound to discourage such shareholders from private enforcement of the proxy rules. . .").

The *Mills* presumption is a logically compelling means of promoting fair suffrage. *See, e.g.*, R. Clark, Corporate Law 386 (1986)("The idea behind [*Mills*] is, of course, that when a court finds a misstatement or omission to be material, that finding itself embodies a conclusion that the defect probably would have been considered important by a reasonable shareholder trying to decide how to vote; it would have affected her decision making process if not the actual decision"). Once a material misstatement or omission is demonstrated in accordance with the carefully-crafted standards set forth in *TSC Inc. v. Northway* and *Virginia Bankshares Inc. v. Sandberg*, the value of the litigation in vindicating the Congressional policy of fair suffrage is clear.

Nor is there any justification for dismissing a case such as this on grounds that litigation over the fairness of management's conduct is of state rather than federal concern. To be sure, state courts are available to consider claims of managerial breaches of fiduciary duty in unduly favoring one potential suitor over another. Cases have underscored the legitimacy of investor concern in this kind of situation. And insofar as what is alleged is simply a breach of duty, state court is where such suits belong. *See Santa Fe Indus. v. Green*, 430 U.S. 462 (1977).

But where those soliciting proxies cover their breaches by dishonest means – misrepresenting the facts, or omitting facts necessary to make what is said not misleading – Section 14(a) clearly expresses a legislative choice to make the matter one of federal concern. In each of its cases dealing with Section 14(a), this Court has accepted that Congress based that section on the perceived need for uniform federal standards for assuring fair suffrage in proxy voting by shareholders of large nationwide corporations. In the face of this clear Congressional determination, investors' right to managerial honesty should not be left dependent on varied and often underdeveloped state standards governing truth-telling in shareholder voting.

5. THE COURT OF APPEALS' DISMISSAL OF PETITIONERS' CLAIM BASED ON SANDLER O'NEILL'S FAIRNESS OPINION WAS UNJUSTIFIED

One prong of petitioners' case that was not resolved by the court of appeals on grounds of failure to show causation was petitioners' claim against Sandler O'Neill, an investment banking firm, for its fairness opinion. The proxy solicitation included an opinion by Sandler O'Neill that the Astoria merger proposal was "fair, from a financial point of view." The court of appeals affirmed dismissal here because it believed that petitioners had failed to allege "provable facts" undercutting the accuracy of that statement, as called for under *Virginia Bankshares*, 501 U.S. at 1094.

We submit that this dismissal was also in error, for reasons closely related to those underlying the causation analysis. The court of appeals assumed that the facts had to relate to intrinsic financial valuation matters, such as comparisons to comparable transactions or present value calculations. In *Virginia Bankshares*, indeed, those were the kind of facts that this Court suggested might be relevant. *Id.*

Here, however, context does matter. That portion of *Virginia Bankshares* cited by the court of appeals was an affirmance of plaintiffs' claim that the fairness opinion was misleading. This Court was making the simple point that statements of opinion could be challenged as factually inaccurate so long as there is "garden variety evidence" by which to test its accuracy. All that the Court was insisting on is facts that could be evaluated objectively. It was making no litmus test for what would be so probative.

However, petitioners' claim is that a statement of financial fairness was plainly rendered misleading by the omission of the facts relating to North Fork's serious, credible and easily verifiable (both through oral testimony and documentary evidence) expression of interest in and pursuit of The Greater, as discussed previously. When there are competing potential bidders (which was not the case in

Virginia Bankshares), a price simply cannot be characterized fair when there is an undisclosed expression of interest from a third party in making a superior offer, which expression has inexcusably been frustrated by denying it access to corporate accounts and records. Sandler O'Neill knew all the relevant facts when it gave its opinion. This, we submit, was precisely the sort of "provable fact" that satisfies *Virginia Bankshares.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 22, 2000

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(Any footnotes trail end of each document)

Docket No. 99-7199

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants

v.

GERALD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. DE NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP., ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and ASTORIA FEDERAL SAVINGS & LOAN, Defendants-Appellees,

MICHAEL HENCHY, DANIEL J. HARRIS, PHILIP CIMINO, PHILIP SPIES, and R. CARLSON, Defendants.

October 12, 1999, Argued
July 10, 2000, Decided
August 24, 2000, Amended

COUNSEL:
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MICHAEL H. BARR, Sonnenschein Nath & Rosenthal (Steven K. Barentzen, on the brief), New York, New York, for Defendant-Appellees Outside Directors of Greater New York Savings Bank.

JUDGES:
Before: WINTER, Chief Judge, NEWMAN, Circuit Judge, and KEENAN, District Judge.

OPINIONBY:
WINTER

OPINION:

WINTER, Chief Judge:

Leonard Minzer and Harry Schipper, on behalf of themselves and similarly situated shareholders, appeal from then-Chief Judge Sifton's dismissal of their complaint. It alleged that a proxy statement seeking shareholder approval of a proposed merger was materially misleading, in violation of Section 14(a) of the Exchange Act, *see 15 U.S.C. § 78n*(a), and Rule 14a-9, *see 17 C.F.R. § 240.14a-9(a)*. Appellants also alleged a breach of state law fiduciary duties. We affirm the dismissal of the federal claim on the ground that the allegedly material omissions in the proxy statement would not have induced any reasonable investor to be less likely to approve the objected-to merger. There was, therefore, no causal link between the omissions and any harm resulting from approval of the merger. We dismiss appellants' state law claims without prejudice.

BACKGROUND

In reviewing a dismissal under Rule 12(b)(6), we take as true the allegations of the complaint, here the second amended corrected complaint and the proxy statement, which is incorporated by reference. *See, e.g., Koppel v. 4987 Corp.*, 167 F.3d 125, 128 (2d Cir. 1999).

In early 1997, Gerald Keegan, the president of Greater New York Savings Bank ("Greater New York"), began exploratory merger talks with the top management of Astoria Financial Corporation and its subsidiary Astoria Federal Savings and Loan Association (collectively, "Astoria"). On February 26, 1997, Thomas O'Brien, the Vice Chairman of North Fork Bancorporation, Inc. ("North Fork"), phoned Keegan and informed him of North Fork's interest in a merger with Greater New York. The negotiations with Astoria continued, and, on March 16, Astoria's Chief Executive Officer informed Keegan that Astoria would, subject to due diligence -- essentially an inspection of Greater New York's books -- be willing to pay approximately $ 18 per share in cash and stock for Greater New York's stock. The next day, John A. Kanas, North Fork's Chief Executive Officer, called Keegan and informed him that North Fork had acquired a significant stake in Greater New York and that he desired a face-to-face meeting to discuss a merger. Keegan declined the invitation, stating that Greater New York was not planning to merge and that he was unwilling to talk to North Fork under any circumstances. However, that same day, Keegan discussed both the Astoria offer and the North Fork expression of interest with his board. The board authorized Keegan to proceed with the Astoria transaction.

Also on the same day, Kanas drafted a strongly worded letter expressing his disappointment at Keegan's refusal to arrange a meeting and offering a 2-for-1 stock-for-stock merger, subject to "customary due diligence." This offer would have allegedly valued Greater New York's stock at

approximately $ 19 per share. Kanas never sent that letter but did send a milder letter four days later. Either the same day or the next, Christopher Quackenbush, a principal at Sandler O'Neill & Partners, L.P., Greater New York's investment bank, suggested to Kanas that Greater New York "was willing to reconsider." The two arranged a telephone conversation for March 19.

Between March 19 and March 27, 1997, Quackenbush had a series of telephone calls with Kanas and O'Brien. Kanas asked to make a presentation to Greater New York's board, but no such opportunity was offered. O'Brien pressed for the opportunity to conduct due diligence and told Quackenbush that "in the absence of due diligence, North Fork did not know if everything was as it had modeled it or presumed it to be and that diligence was very important and was necessary before making any kind of final offer." North Fork was never given the opportunity to conduct due diligence and had to rely solely on publicly available information in determining Greater New York's financial condition. Astoria, however, was given an opportunity to conduct due diligence and acquire nonpublic financial information about Greater New York.

Greater New York convened a special meeting of its board on March 27, 1997. Kanas went to Greater New York's offices but was denied entry to the meeting. Nevertheless, Quackenbush informed Kanas by telephone that the board was interested in as many details as were available about North Fork's bid. Kanas offered a stock-for-stock merger in which North Fork would acquire Greater New York, exchanging .486 North Fork shares per Greater New York share (approximating the value of the offer to be $ 19.00 per share). Quackenbush asked if that was North Fork's best offer; Kanas replied, "that was our best bid until such time as we would be allowed to go in and . . . [conduct] due diligence." He informed Quackenbush that he had a team of bank officers prepared to work over the weekend to conduct

due diligence, and that North Fork was "unwilling to raise [its] price or consider raising [its] price until such time as [it] had a chance to [conduct due diligence]." In refusing to increase North Fork's bid, Kanas told Quackenbush that "North Fork's bid included a substantial one-time charge to cover credit related issues," but that North Fork had "already factored that [charge] in so [its] price wouldn't go down." After Quackenbush pressed him as to whether the price would go up, Kanas replied, "it won't go down." Kanas was also asked whether Keegan would have a major role to play in any such merged enterprise, to which Kanas responded in the negative.

Quackenbush described his conversations with Kanas to Greater New York's board, which in turn requested Astoria to increase its bid. Astoria raised its stock and cash bid to $ 18.94. This price included a substantial premium over Greater New York's trading price. Two days later, on March 29, 1997, Greater New York's board unanimously approved a merger with Astoria. As a part of the merger agreement, Greater New York's board agreed to termination fees capped at $ 5 million (with a maximum aggregate profit capped at $ 10 million) in the event that the merger did not go through and a lock-up option allowing Astoria to purchase 19.9% of Greater New York's outstanding common shares under certain conditions. Also, Greater New York agreed not to entertain any other inquiries about a merger. Finally, it is alleged that Keegan was employed by Astoria as part of the merger agreement, and Greater New York's board members were given three-year contracts providing them a stipend and stock options in return for serving on the Astoria Advisory Board.

On March 31, 1997, Greater New York and Astoria publicly announced the merger. Within seventy-two hours of that announcement, appellants filed a New York state court action against Greater New York's board for alleged breaches

of fiduciary duty. The parties subsequently consented to dismiss that state court action without prejudice.

On June 24, 1997, Astoria and Greater New York distributed proxy statements seeking their respective shareholders' approval of the transaction. The portions of Greater New York's proxy statement relevant to the present appeal are as follows:

> On March 17, 1997, Mr. Keegan received a call from the chief executive officer of another banking organization (the "Other Organization") expressing an interest in acquiring [Greater New York].
>
> Mr. Keegan reported the contact with the chief executive officer of the Other Organization to the [Greater] Board at a special meeting on March 17, 1997. . . .
>
> Subsequently, the chief executive officer of the Other Organization initiated a series of telephone calls with Mr. Keegan and [Greater New York's] investment bankers, Sandler O'Neill, regarding its interest in [Greater New York] and seeking the opportunity to make a proposal regarding a possible business combination with [Greater New York]. As part of these discussions and at the request of [Greater New York], the Other Organization submitted a letter intended to address its views on how an acquisition by it would impact the communities and customers served by [Greater New York] and its employees.
>
> . . . . At [a special] meeting, the [Greater New York] Board considered, among others, the strategic alternatives available to [Greater New York], the [Astoria] proposal and the alternatives to the [Astoria] proposal, including a possible combination with the Other Organization, and their feasibility.

> As part of the [Greater New York's] Board's deliberations, it instructed Sandler O'Neill to contact the Other Organization to inquire as to the consideration it would be willing to provide to [Greater New York's] shareholders in a combination with [Greater New York] and its ability to move expeditiously to sign a definitive agreement with respect to such a transaction. The Other Organization responded with a proposal that involved a combination conditioned on "pooling of interests" accounting treatment and consideration consisting of a fixed exchange ratio of the Other Organization's common stock that had a value of $ 18.53 per share of [Greater New York] Common Stock based on the closing price of the Other Organization's common stock on March 27, 1997. Sandler O'Neill asked the Other Organization to increase its price and it declined to do so. The Other Organization also indicated that it could move expeditiously to enter into a definitive agreement. This proposal was immediately communicated to the [Greater New York] Board.

The proxy statement also contained a statement by Sandler O'Neill that the merger was "fair, from a financial point of view" and a recommendation of Greater New York's board that the shareholders approve the proposed Astoria merger.

On July 18, 1997, appellants initiated the instant lawsuit in the Eastern District of New York. Their complaint alleged that the proxy statement was materially misleading and that Greater New York's directors had breached state law fiduciary duties in negotiating and recommending the Astoria merger. On August 1, 1997, the shareholders of Astoria and Greater New York approved the merger. The district court reserved decision on appellees' motion to dismiss and ordered expedited discovery. Appellants obtained document

discovery and deposed, *inter alia,* Keegan, Kanas, and Quackenbush. On September 2, appellants amended their complaint to reflect the fruits of that discovery.

On September 22, 1997, the district court issued a written decision denying appellants' motion for a preliminary injunction to block the merger, *see Minzer v. Keegan, 1997* No. 97- CV-4077, *U.S. Dist. LEXIS 16445,* (E.D.N.Y. Sept. 22, 1997), and the merger was subsequently effected. On June 1, 1998, the district court granted defendant's motion to dismiss the amended complaint without prejudice. *See Minzer v. Keegan,* No. 97-CV-4077 (E.D.N.Y. June 1, 1998). Appellants thereafter amended their complaint again, and on January 25, 1999, the district court dismissed the second amended complaint. *See Minzer v. Keegan*, No. 97-CV-4077 (E.D.N.Y. Jan. 25, 1999). This appeal followed.

DISCUSSION

We review a Fed. R. Civ. P. 12(b)(6) dismissal *de novo* and may affirm only if it appears beyond doubt that appellants can prove no set of facts that would entitle them to relief. *See Koppel*, 167 F.3d at 130.

Rule 14a-9, promulgated pursuant to Section 14(a) of the Exchange Act, states that:

> No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading ....

17 C.F.R. § 240.14a-9(a). There is an implied private right of action under Rule 14a-9. *See J.I. Case Co. v. Borak, 377 U.S. 426, 431, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964).*

Appellants allege a violation of Rule 14a-9 as to the proxy statement's disclosure regarding three matters: (i) North Fork's attempts to negotiate a merger with Greater New York and the thwarting of those efforts; (ii) the Sandler O'Neill opinion as to the fairness of the terms of the Astoria merger; and (iii) the recommendation of Greater New York's board regarding the Astoria merger. We address each in turn.[1]

a) *North Fork's Efforts to Negotiate a Merger*

With regard to North Fork's efforts to negotiate a merger and appellees' thwarting of those efforts, appellants catalog the following as material omissions in the proxy statement:

> i) the competing offeror [North Fork] was a serious, motivated institution that already had a considerable stake in [Greater New York] and which had the wherewithal and interest to compete on a level playing field if allowed to do so;
>
> ii) [North Fork] did not flatly decline to raise its price;
>
> iii) [North Fork] was arbitrarily denied due diligence by [Greater New York] and/or Keegan which could have supplied information justifying a premium bid by [North Fork];

iv) [North Fork] remained interested in [Greater New York] even after declining to raise its bid, subject to due diligence;

v) [North Fork] proposed a better and higher offer than Astoria's, when scrutinized, even without the due diligence afforded Astoria;

vi) defendants were not even-handed and balanced with [North Fork] because they denied it the due diligence information needed in order to facilitate and elicit a competitive bid from [North Fork] but did furnish it to Astoria; and

vii) the Board may have entertained Astoria and not [North Fork] because [North Fork] was not prepared to offer employment to [Greater New York] Board members (including Keegan), but Astoria was.

Appellants' Br. at 12-13.

We may assume that the omitted information would have been important to a reasonable shareholder in determining how to vote on the proposed merger with Astoria and thus meets the standard definition of materiality. *See TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976),* (holding that an omitted fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"). However, in the proxy context this definition of materiality assumes that the omitted information would have influenced a reasonable shareholder against the proposed transaction for which proxies were sought.[2] Here, the omitted information would not have made a reasonable shareholder

any less likely to favor the objected-to transaction, and such an omission, material or not, could not have caused the injury for which damages are sought.

In *Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1990)*, the Supreme Court held that a materially misleading proxy solicitation was not actionable where the controlling shareholder had enough votes to approve the objected-to transaction without seeking proxies. *See id. at 1099-1108.* The rationale of that holding applies equally to cases where the omissions would have caused a reasonable shareholder to favor rather than disfavor the transaction. In *Virginia Bankshares,* the omissions were not actionable because the disputed transaction would have occurred even if the proxy statement had been complete and accurate. *See id. at 1107-08, 111 S. Ct. 2749.* That is also the case here. Had a reasonable Greater New York shareholder been fully informed, that shareholder would not have been any less likely to vote for the Astoria merger knowing of the cataloged information than being ignorant of it.

The matters omitted amount to the following: Greater New York's board and management were determined to reject a merger with North Fork and to bring about a merger with Astoria, at least in part because Astoria was offering future employment to the members of the board and Keegan. However, a reasonable shareholder would, upon learning such information, hardly be induced to vote against the merger with Astoria. At the time of the vote, a fully informed, reasonable shareholder would calculate that a defeat of the Astoria merger would leave Greater New York's shareholders with the existing management and corporate structure but without the substantial premium available in the Astoria deal. Such a shareholder would not believe, as appellants posit, that there was a substantial likelihood of a near-term and more favorable merger with North Fork after rejection of the Astoria merger.

The complaint alleged that North Fork continued to have an "interest" in Greater New York, but a reasonable shareholder would have grave doubts about whether that "interest" would ever culminate in a merger with Greater New York, at least in the near term. The termination fee and lock-up option in the Astoria merger agreement hardly made Greater New York a more tempting target for North Fork, and the complaint offers no concrete assurance that North Fork would have made an offer significantly better than Astoria's. More significantly, even if North Fork's desire for Greater New York led it to offer more favorable terms than Astoria's bid, a reasonable shareholder would anticipate that Greater New York's board and management would mount defensive measures effectively thwarting any offer by North Fork. The complaint alleged that the board and management did not want to talk with North Fork "under any circumstances," and there is little in New York law that would force them to abandon that stance. For example, there is no statutory law or caselaw requiring the board to consider merger offers or, in the presence of such offers, to conduct a fair auction. Indeed, there are New York statutes that allow management considerable leeway in defending against hostile takeovers, *see* N.Y. Bus. Corp. Law § § 501(c), 505(a), 912(a)(10) (authorizing the creation by publicly traded New York corporations of shareholder rights plans that permit board to discriminate against "interested shareholders" who own 20% or more of company's stock), and there is no caselaw that would enable shareholders to compel Greater New York's board to negotiate with North Fork. *See generally* William D. Harrington, *44 Syracuse L. Rev. 27, 47-58 (1993)* (discussing New York's anti-takeover statutes); William D. Harrington, *42 Syracuse L. Rev. 299, 320-27* (same, commenting that New York's statutes are equivalent of "'Just Say No' defense against an unwanted takeover"). Were New York courts to follow leading precedents from other states, *see, e.g., Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1990)* (holding in favor

of board's "defense-motivated" actions against plaintiff Paramount's takeover attempts), it would not require much ingenuity on Greater New York's board or management's part to thwart North Fork's advances, however favorable they might seem to shareholders.

At best, therefore, a reasonable shareholder would have foreseen a protracted struggle between North Fork and Greater New York's board, with the latter having a powerful advantage. Any North Fork deal would be perceived as being a marginally possible event of uncertain value in the distant future. The present value of such a deal, discounted by its improbability, would be viewed by a reasonable shareholder as considerably less valuable than the cash-in-hand Astoria deal. There is, therefore, no sense in which the omitted information, if available, would have diminished a reasonable shareholder's favorable view of the merger with Astoria.

b) *The Sandler O'Neill Opinion*

Appellants also challenge as materially misleading the proxy statement's incorporation of Sandler O'Neill's fairness opinion, which determined the Astoria merger to be "fair, from a financial point of view." Even assuming for purposes of analysis that, at the time the opinion was proffered, North Fork's offer was higher than Astoria's, the Astoria offer would not necessarily be deemed financially unfair from the perspective of Greater New York's shareholders. *See Koppel, 167 F.3d at 134* ("[T]here is no § 14(a) violation for merely failing to inform shareholders that a proposed action is not subjectively the most beneficial to an entity's shareholders . . . ."). The fairness opinion did not purport to suggest that the Astoria merger was the highest potential price for Greater New York but only that the "consideration . . . [was] fair, from a financial point of view." The fairness opinion also stated that Sandler O'Neill had not "solicit[ed] indications of interest in a potential transaction from other third parties

other than one third party specifically identified to us by [Greater New York's] Board of Directors," and specifically noted, in bold capitalized letters: "The Sandler O'Neill opinion . . . does not address the underlying business decision of [Greater New York] to engage in the merger and does not constitute a recommendation . . . ."

To attack the Sandler O'Neill opinion as materially misleading, therefore, appellants must allege with particularity, Fed. R. Civ. P. 9(b), "provable facts," *see Virginia Bankshares, 501 U.S. at 1094, 111 S. Ct. 2749,* undercutting the statement that the merger was "fair from a financial point of view." An example of such a fact might be that the premium paid by Astoria over historic share price was substantially below that of comparable transactions. Another example of such a fact might be that the merger price did not adequately reflect the present value of expected future free cash flows to the shareholders. No such allegation or showing has been made here. The merger price included a significant premium over historical trading prices for Greater New York's stock. Appellants did allege that the transaction was priced lower than the average banking merger in terms of book value multiple, *see* Compl. P 57, but such an allegation indicates nothing about the transaction's financial fairness absent allegations of facts suggesting that this ratio differential does not reflect appropriately priced risk variations. And the proxy statement clearly suggests that Greater New York's lower book value premium is explained by above-average risk. The proxy statement reports, *inter alia*, that the market-value-to-book-value ratio for Greater New York's stock was 1.48 compared to a company mean and median of 1.58; that Greater New York's ratio of nonperforming loans to total loans was 19.69%, compared with a 3.38% mean and 1.52% median for comparable companies; and that Greater New York's ratio of nonperforming assets to total assets was 7.91% compared with a 1.61% mean and 0.86% median for comparables.

Thus, appellants have not alleged facts tending to suggest that the Sandler O'Neill opinion was materially misleading in opining that the transaction at issue was financially fair.

c) *The Recommendation of Greater New York's Board*

Finally, appellants challenge the recommendation of Greater New York's board that the shareholders approve the Astoria merger. For the most part this challenge overlaps with the alleged omissions concerning North Fork's efforts to negotiate a merger that is discussed in part (a) above. As such, it suffers from the same flaw -- a lack of causal link with the approval of the Astoria merger. To be sure, given the allegations of the complaint, Greater New York's board and Keegan may have deprived the shareholders of an opportunity to select a more profitable (for the shareholders) merger with North Fork and they may have done so to obtain a more profitable deal for themselves. However, knowing that management had a powerful self-interest in rejecting North Fork's advances would not have caused a reasonable shareholder to reject the Astoria deal, for reasons stated in part (a).

It may also be that the allegations amount to a breach of fiduciary duties under state law, but such conduct, without an accompanying materially misleading disclosure, does not state a claim under the federal securities laws. *See Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 and 474-80, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977),* (refusing to extend federal securities laws to "overlap and quite possibly interfere with state corporate law"); *Koppel, 167 F.3d at 139* (reinstating state law claims because court concluded there was a federal claim to which state law claims could be appended). We also note that appellants have not alleged that the omissions caused them to lose state court rights. *See RCM Sec. Fund, Inc. v. Stanton, 928 F.2d 1318, 1327-28 and 1327 n.2 (1991)* (explaining interplay between federal and state claims where such claims are "interdependent"). Indeed, given their

bringing of a state court action upon announcement of the merger -- an action that can be revived -- no such claim could be made. *See Virginia Bankshares, 501 U.S. at 1106-08, 111 S. Ct. 2749.*

CONCLUSION

The alleged omissions to the proxy statement challenged by appellants cannot establish a claim under Rule 14a-9. Having determined that appellants' federal claim lacks merit, we decline to exercise pendant jurisdiction over their remaining state law claims. We therefore affirm.

----------Footnotes----------

* The Honorable John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation

[1] We do not analyze the sufficiency of appellants' complaint under the pleading standards established by the Private Securities Litigation Reform Act of 1995 (the "Act"), *15 U.S.C. § 78u-4*(b)(1). We may assume for purposes of this appeal that appellants' pleadings are sufficient under the Act's requirements because the underlying facts cannot establish liability under Rule 14a-9, a conclusion that would not be altered by more detailed pleading.

[2] We are aware that *Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970),* states:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials,

> was an essential link in the accomplishment of the transaction.

Id. at 385. However, the context in which that statement was made and the subsequent decision in *Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991),* make it clear that the Court was only relieving plaintiffs of the difficult burden of proving that, properly informed, shareholders would have defeated the transaction in question. The Court did not intend to provide a windfall to plaintiffs suing over an omission that, if rectified, would not cause shareholders to be any less likely to approve the transaction.

Docket No. 97-CV-4077

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEONARD MINZER ET AL,
Plaintiffs

v.

GERALD C. KEEGAN, ET AL,
Defendants.

Dated: January 25, 1999

MEMORANDUM AND ORDER

Leonard Minzer and Harry Schipper, formerly shareholders of the Greater New York Savings Bank ("GNYSB" or "The Greater") , sue to enjoin and to recover damages resulting from the merger of The Greater and Astoria Financial Corporation ("AFC") . The second amended complaint alleges violations of Section 14(a) of the Securities Exchange Act of 1934 ("the 34 Act") and Rule 14a-9 promulgated there under, as well as violations of state law. The first amended complaint was dismissed for failure to state a claim, with leave to amend. Presently before the Court are defendants' motions to dismiss the second amended complaint pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(6), and 15(a) and 15 U.S.C. § 78u-4(a) (2) (A) (i). For the reasons set forth below, the second amended complaint is dismissed.

BACKGROUND

For these motions, I assume as true the facts set forth in the second amended complaint. I take particular note of allegations that were not set forth in the first amended complaint.

Plaintiffs Leonard Minzer and Harry Schipper were, as already noted, stockholders in The Greater. Plaintiff Minzer is a resident of New York and of this District.

Defendant AFC is a Delaware corporation with its principal place of business in New York. It is a holding company which operates the Astoria Federal Savings and Loan Association ("AES"; AFS and AFC, collectively, "Astoria"). AFS is a federally chartered savings and loan association with its principal place of business in New York and is a wholly owned subsidiary of AFC. AFS invests deposits from the general public in residential mortgage loans and mortgage-backed securities. Since the merger at issue here, AFS has taken over the operations of The Greater.

Before the merger, defendant The Greater was a New York chartered savings bank with its principal offices in New York. Publicly traded on the NASDAQ Exchange, The Greater had 13,714,485 common shares outstanding and was entitled to vote at the meeting approving the merger with Astoria.

Prior to the merger, defendant Gerard C. Keegan ("Keegan") was Chairman of the Board of Directors, Chief Executive Officer, and President of The Greater. At the time of the merger Keegan owned 298,193 shares of The Greater's common stock, or 2.14% of the shares outstanding, and 15,906 shares of The Greater's Series A preferred stock, or 1.08% of the shares outstanding.

Defendants Philip F. Ruppel, George H. Sorter, Gwendolyn Calvert Baker, William F. de Neergaard, James G. Peel, C. Stephen Connolly, William F. Ward, Nicholas A. Marshall, and Peter C. Haeffner, Jr. (collectively, "the Outside Directors") were members of the Board of Directors of The Greater but did not hold executive positions. The second amended complaint alleges that Keegan and the

Outside Directors "have solicited the vote of shareholders and consummated a merger transaction under false pretenses, have breached their duties of care, loyalty and good faith, and have abused the control reposited in them by virtue of their high level positions, all to benefit their own interests at the detriment of [The Greater's] public shareholders.' (Second Am. Compl. at ¶ 1.) Though not alleged in the first amended complaint, the second amended complaint states that the Outside Directors were directly or indirectly involved in:

> (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or otherwise, between [the parties]; (iii) the negotiation process as alleged more fully herein; (iv) all Board of Directors meetings of The Greater; (v) preparing, reviewing, editing, commenting, approving, filing and disseminating the contents of the Proxy/Prospectus; and (vi) the decision to solicit the votes of shareholders.

(Second Am. Compl. at ¶ 1.)

Plantiffs further allege:

> By the acts, transactions, and courses of conduct alleged [in the second amended complaint), the defendants, individually and as part of a common plan or scheme have, in violation of the federal securities laws and in total disregard of their respective fiduciary duties, pursued a plan to benefit themselves and to mislead [The Greater's] public stockholders in connection with soliciting their proxies through false pretenses by misrepresenting and concealing material information, considerations, and evaluations relating to the merger, and to divest plaintiffs and the other members of the class of their investments in [The Greater] at a grossly inadequate price and as a result

of unfair dealing.

(Second Am. Compl. at ¶ 23.)

More specifically, plaintiffs allege that in January of 1997 Keegan met George L. Engelke, Jr., Chief Executive Officer of Astoria, to discuss a possible merger of their two banks. A month later, Thomas O'Brien, Vice Chairman of North Fork Bancorporation ("North Fork") , another Long Island bank, contacted Keegan on behalf of North Fork's Board. Mr. O'Brien informed Keegan that North Fork had acquired 1.6 million shares of The Greater's non-voting Series B preferred stock, approximately 82% of the series, and was interested in discussing a possible merger with The Greater. Keegan responded that he had no interest in discussing a merger with North Fork.

On March 16, 1997, Engelke and Keegan met at Engelke's residence, where Engelke explained what he saw as the benefits of a combination between Astoria and The Greater. He stated that Astoria was willing to pay approximately $18 per share for The Greater's common stock in consideration of cash and Astoria common stock. The price, Engelke stated, might be increased after a due diligence investigation had been completed.

The next day, John A. Kanas, Chairman of the Board of North Fork, called Keegan and told him that North Fork "had a serious interest in sitting down with Mr. Keegan and talking to him about a strategic combination of the two companies." (Second Am. Compl. at ¶ 27.) Mr. Keegan allegedly stated that The Greater did not plan to combine with any bank and that he did not want to talk to North Fork under any circumstances, despite not knowing what price North Fork would offer. Later that day, at a special meeting of The Greater's Board, Keegan reported his conversation with Kanas and Engelke. The Board authorized further

consideration of a combination with Astoria and authorized Astoria to do due diligence. No notes of this meeting exist.

That day, after speaking with Keegan, Kanas drafted but did not send a letter to Keegan in which he expressed his disappointment at Keegan's refusal to meet with him and in which he stated that North Fork would offer, subject to due diligence, 0.5 shares of its common stock for each share of The Greater's common stock, a value of $19 at then-existing market prices.

On the evening of the same day, Keegan, O'Brien, and Christopher Quackenbush met for dinner. Mr. Quackenbush is a principal of Sandler O'Neill & Partners, L.P., the investment banking firm representing The Greater. Shortly after this dinner, Quackenbush suggested to Kanas that The Greater would be willing to reconsider and speak to him and that Kanas should not mail the draft letter. Mr. Kanas complied with Quackenbush's request.

On March 19, 1997, Kanas called Keegan and told him of North Fork's efforts in community and customer relations, adding that North Fork placed "the interest of the owners of the company upfront." (Second Am. Compl. at ¶ 33.) Mr. Keegan told Kanas that The Greater would have a Board meeting the following week and that he would inform the Board of Kanas' position.

On March 21, 1997, Kanas wrote to Keegan at the suggestion of Quackenbush and thanked Keegan for talking to him two days earlier and informed Keegan of North Fork's excellent valuation by investment bankers. No one from The Greater responded to Kanas' letter, and Kanas did not meet with Keegan or with the Board of The Greater. Nevertheless, between March 19 and March 27, 1997, Kanas spoke to Quackenbush a number of times and urged a meeting between himself and The Greater. During this period,

O'Brien told Quackenbush that, "in the absence of due diligence, North Fork did not know if everything was as it had modeled it or presumed it to be and that diligence was very important." (Second Am. Compl. at ¶ 37.) Mr. O'Brien also told Quackenbush that North Fork would require an opportunity to do due diligence before making a final offer. North Fork was not invited to conduct due diligence.

Astoria performed a due diligence review through March 27, 1997. Mr. Kanas attempted to meet with the Board but was not permitted to do so. Mr. Quackenbush, speaking for The Greater, told Kanas that The Greater's Board wanted to know North Fork's bid by telephone and what consideration North Fork would give to "social issues." By "social issues," The Greater's Board is alleged to have meant North Fork's "attitude toward the Board and toward Mr. Keegan." (Second Am. Compl. at ¶ 42.) The Board of The Greater is alleged to have asked North Fork whether there would be a "major role" for Keegan at North Fork, were North Fork to acquire The Greater. *Id.*

Mr. Kanas told Quackenbush that "North Fork was ready to make a bid and propose a transaction contingent upon a pooling accounting treatment and a tax free exchange of shares with an exchange ratio of .486 shares of North Fork common stock for each share of common stock of The Greater." (Second Am. Compl. at ¶ 41.) But for a downturn in the stock of North Fork that day, Kanas stated, the value of the transaction would have been approximately $19 per share. *Id.* As to the "social issues," Kanas told Quackenbush that North Fork "would probably be willing to give [The Greater] one Board seat and that was somewhat negotiable, and that if Mr. Keegan wanted to be one of those Board members, [North Fork] would have no objection to that." (Second Am. Compl. at ¶ 42.) When Quackenbush asked if Keegan "could expect to have an active role" at North Fork, Kanas said that there would be no such role for Keegan. *Id.*

In response to a question from Quackenbush whether the proposal represented North Fork's best bid, Kanas said that "that was [North Fork's] best bid until such time as [North Fork] would be allowed to go in and examine the books and records of [The Greater] and do what is commonly referred to as due diligence." (Second Am. Compl. at ¶ 43.) Mr. Kanas further stated that he had staff on Long Island prepared to spend Easter weekend doing that due diligence if permitted. When asked by Quackenbush if North Fork's bid would increase after due diligence, Kanas said: "my price won't go down." (Second Am. Compl. at ¶ 45.) Mr. Kanas' assurance against a lower bid was not alleged in the first amended complaint. Kanas stated that, if North Fork were given the opportunity to conduct due diligence, "it would consider making another offer, including a higher offer." (Second Am. Compl. at ¶ 56.)

Mr. Quackenbush told Kanas that he could expect to hear something from Quackenbush either over the weekend or the following Monday. Mr. Quackenbush then reported his conversation with Kanas to the Board, which was then considering Astoria's offer to merge with The Greater at a price of $18.57, or four cents per share more than the offer from North Fork, given the downturn in North Fork's share price. (Second Am. Compl. at ¶ 49.) The Greater asked Astoria to increase the exchange ratio for Astoria shares so as to reflect a value of $19 per share based on the price of Astoria stock at the close of trading on March 27, 1997. Astoria agreed to a ratio of .5 shares of Astoria stock per share of The Greater's stock, or a value of $18.94 per share. In return, Astoria was granted a lock-up option to purchase 19.9% of The Greater's shares at The Greater's Board meeting on March 27, 1997. Astoria's bid was approximately the same as North Fork's bid in the absence of due diligence. The second amended complaint states that " [t] here are no surviving minutes or notes of The Greater's March 27, 1997

Board meeting." (Second Am. Compl. at ¶ 52 (emphasis in original)).

On March 29, 1997, at a special meeting, The Greater's Board unanimously approved the merger with Astoria. There are also "no surviving minutes or notes" of this meeting. (Second Am. Compl. at ¶ 54; emphasis in original.) The proposed merger was announced on *PR Newswire*, a financial wire service. Coverage also appeared on *Bloomberg News*, and in *Newsday*, *The New York Times*, and *The American Banker*.

The second amended complaint (but not the first amended complaint) alleges that Astoria paid 1.65 times book value for The Greater compared with two times book value paid in the majority of bank acquisitions in the first half of 1997. Mr. Kanas has testified in a deposition in connection with this case that North Fork remained interested in purchasing The Greater.

On or about June 24, 1997, The Greater and Astoria filed with the Securities and Exchange Commission ("SEC") a Joint Proxy Statement/Prospectus ("PS" or "the Proxy") pursuant to Section 14(a) of the Securities Exchange Act of 1934. Both banks began distributing the Proxy to their shareholders on June 25, 1997. Plaintiffs' federal claims are predicated upon alleged omissions and misstatements in the Proxy statement. As quoted in the amended complaint, the Proxy states that "[o]n March 17, 1997, Mr. Keegan received a call from the Chief Executive Officer from another banking organization (the "Other Organization") expressing an interest in acquiring [The Greater] ." (Second Am. Compl. at 63.) Plaintiffs allege that the Proxy omits to identify the "Other Organization" as North Fork; that North Fork owned 80% of The Greater's Series B preferred stock and 625,000 shares of its common stock; that North Fork had made repeated requests and was denied the opportunity to speak to

Keegan to make a presentation to The Greater's Board and to conduct due diligence; that North Fork was asked if Keegan would have a major role following the merger, and it responded that Keegan would not play a major role; that North Fork assured The Greater that it would not reduce its bid upon completing due diligence; that The Greater had stated it did not want to talk with North Fork under any circumstances; and that, even if North Fork increased its bid, The Greater's directors would not have agreed to a transaction with North Fork. (Second Am. Compl. at ¶ 65.)

The Proxy states that "Sandler O'Neill asked the Other Organization to increase its price and it declined to do so" and is alleged to omit that North Fork might have raised its bid had it been allowed to do the due diligence it sought.

The second amended complaint further alleges that North Fork's bid was "tax neutral" as it was an all stock bid that would not be taxed until the shareholder sold the stock. The first amended complaint had described North Fork's bid as "tax-free." In contrast to North Fork's bid, Astoria's bid was composed of 75% stock and 25% cash. The cash portion of the bid would be immediately taxable upon consummation of the merger. Furthermore, defendants failed to disclose that "North Fork's proposed consideration was not static cash or stock, but was reflected in 100% stock which had substantially appreciated in value." (Second Am. Compl. at ¶ 69.) Plaintiffs contend that the nondisclosure of North Fork's "tax neutral" bid "is misleading because it implies that any transaction would have some immediate tax consequence, notwithstanding that the North Fork proposal would not." (Second Am. Compl. at ¶ 70.) Plaintiffs further allege that, without considering tax consequences, North Fork's offer was higher than Astoria's offer. On the date the Proxy was disseminated, plaintiffs allege that Astoria's offer was worth $21.95 per share. Plaintiffs calculated that value by blending the stock portion with the cash portion of Astoria's offer.

Adding the two portions together yields the $21.95 blended rate. In contrast, North Fork's all-stock offer, made three months prior to the Proxy statement, was worth $22.29 because North Fork's share price had appreciated after North Fork had made its offer.

Plaintiffs' final alleged omission from the Proxy concerns disclosures in the Sandler O'Neill fairness opinion. To plaintiffs the opinion is "false and misleading" because it "fail[s] to disclose that a better and higher offer was made or, if due diligence had been provided, would have been made by North Fork." (Second Am. Compl. at ¶ 72.)

In addition to asserting these alleged omissions, the second amended complaint sets forth facts alleged to constitute breach of state law fiduciary duties. The Greater is alleged to have granted Astoria a breakup fee of $5 million, "substantially in excess of any possible damages to Astoria," and a lock-up option for 19.9% of the company's stock. (Am. Compl. at ¶ 102 (incorporated by reference in the Second Am. Compl.)) Also, the complaint alleges that after the merger Keegan was to become a director and officer of Astoria and that "[h]is one and only noted 'concern' in negotiations with Astoria was that he 'have a position acceptable to peers.'" (Am. Compl. at ¶ 34 (incorporated by reference in the Second Am. Compl.))

In connection with a common law fraud claim against the individual defendants, plaintiffs allege that the defendants

> engaged in a plan, scheme, and unlawful course of conduct, pursuant to which (a) they knowingly engaged in acts, transactions, and practices, and course of business which operated as a fraud on plaintiffs and the Class and (b) made to plaintiffs and the Class various untrue statements of material facts and omitted to state material facts necessary in order

> to make the statements made, in light of the circumstances under which they were made, not misleading.

(Second Am. Compl. at ¶ 98.)

The defendants allegedly "engaged in the pretense of an auction, which was not designed to maximize shareholder value and was masterminded to fend off North Fork, a determined bidder."

(Second Am. Compl. at ¶ 78.) The complaint alleges that, "had members of the class known the truth concerning the matters complained of [in the complaint], they would not have voted their proxies in favor of the merger with Astoria." (Second Am. Compl. at ¶ 99.)

PROCEDURAL HISTORY

Within seventy-two hours of the joint announcement by The Greater and Astoria of their plans to merge, plaintiffs filed an action in New York State court alleging breaches of fiduciary duty by The Greater's Board. On July 18, 1997, plaintiffs filed this lawsuit in federal court. On August 1, 1997, the shareholders of Astoria and The Greater voted to approve the merger; and that week the defendants moved to dismiss the federal complaint. Without objection from defendants, on September 2, 1997, plaintiffs amended their federal complaint.

Plaintiffs moved for a preliminary injunction to block the merger. After a hearing on September 10, 1997, I issued a written opinion denying the motion. *See Minzer v. Keegan*, CV-97-4077 (CPS), 1997 U.S. Dist. LEXIS 16445 (E.D.N.Y. Sept. 22, 1997) (hereinafter, "*Minzer I*"). Astoria and The Greater merged thereafter.

In November 1997 the defendants filed the motions to

dismiss the amended complaint. On June 1, 1998, I granted defendants' motion to dismiss the amended complaint. *See Minzer v. Keegan*, CV-97-4077 (CPS), (E.D.N.Y. June 1, 1998) (hereinafter, *"Minzer II"*). The parties have agreed to dismiss the state court complaint without prejudice.

Plaintiffs amended the federal complaint, and defendants moved to dismiss the second amended complaint on July 21, 1998.

DISCUSSON

This Court has jurisdiction over plaintiff's federal securities law claims under 28 U.S.C. § 1331 and over plaintiff's state law claims under 28 U.S.C. § 1367. Venue is proper under 15 U.S.C. § 78aa, as various acts and transactions alleged to violate the securities laws occurred in this District.

As an initial matter, plaintiffs did not seek leave to amend the first amended complaint after it was dismissed by this Court. Defendants argue that this failure violates Federal Rule of Civil Procedure 15 (a) and that the complaint should be dismissed on that basis. While plaintiffs did not seek leave to amend, the rule provides that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). As the prior complaint was dismissed without prejudice and plaintiffs do request leave to amend in their motion papers, I grant plaintiffs' belated request and consider the complaint properly filed.

Faced with a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b) (6), the court must accept as true all factual averments in the complaint and must not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (*2d Cir. 1991*) (quoting *Conley v. Gibson, 355* U.S.

41, 45-46 (1957) (citations omitted)). The court "must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference," *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991), as well as "matters of which judicial notice may be taken under Fed. R. Evid. 201." *Id.* In *Kramer*, the Circuit held that in federal securities actions the court may take judicial notice of "public disclosure documents required by law to be filed, and actually filed, with the SEC," although not of "other forms of disclosure such as press releases or announcements at shareholder meetings." *Id.* at 774. Since proxy statements are required to be filed under Section 14 of the 1934 Act, the entirety of the Proxy is properly considered in connection with the present motion.

I turn first to plaintiffs' federal securities law claims. Section 14(a) of the 1934 Act provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section [12] of this title.

15 U.S.C. § 78n(a) (1994). Under Rule 14a-9, promulgated under Section 14 (a),

> [n]o solicitation ... shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any

> statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

17 C.F.R. § 240.14a-9(a) (1997). Plaintiffs have a private right of action to enforce Section 14(a) and Rule 14a-9. *See J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964).

In a claim under Rule 14a-9, plaintiff must prove that the proxy statement contains a false or misleading statement of material fact or omits to state a material fact necessary to make the statement not false or misleading; that the misstatement or omission resulted from knowing, reckless, or negligent conduct; and that the proxy statement was an essential link in the proposed corporate transaction. *See Poughkeepsie Savings Bank, F.S.B. v. Morash*, No. 89 CIV 1778, 1989 WL 40008 at *3 (S.D.N.Y. Apr. 14, 1989); *Plant Indus., Inc. v. Bregman*, 490 F. Supp. 265, 269 & n.16 (S.D.N.Y. 1980). A fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also United Paperworkers Int'l Union v. International Paper Co.*, 985 F.2d 1190, 1198 (2d Cir. 1993). The *TSC* Court also noted that materiality involves a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 426 U.S. at 449. In reviewing The Greater's proxy statement, I note the Second Circuit's observations that "[r]are indeed is the proxy statement whose language could not be improved upon by a judicial craftsman sitting in the serenity of his chambers," *Kennecott Copper Co. v. Curtiss-Wright Co.*, 584 F.2d 1195, 1200 (2d Cir. 1978), and that "nit-picking should not become the name of the game." *Id.* Proxy statements need only be

sufficiently accurate not to mislead; they need not be perfect. *Id.*

I pause to note the pleading requirements of the Private Securities Litigation Reform Act of 1995 ("the Reform Act"), 15 U.S.C. § 78u-4. Section 79u-4(b), entitled "Requirements for securities fraud actions," provides:

> (1) Misleading statements and omissions
> In any private action arising under this chapter in which the plaintiff alleges that the defendant -
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.
>
> (2) Required state of mind
> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

The Reform Act applies to private actions under the securities laws, including this action.

When a complaint under Rule 14a-9 alleges an omission rather than a misstatement, the omission must render false or misleading one or more of the statements remaining in the proxy. *See* 17 C.F.R. §240.14a-9(a) (1997); *Caspary v. Louisiana Land & Exploration Co.*, 579 F. Supp. 1105, 1109 (S.D.N.Y. 1983); *Perelman v. Pennsylvania Real Estate Investment Trust*, 432 F. Supp. 1298, 1304 (E.D. Pa. 1977). The Reform Act requires that the complaint first identify each material omission and then identify the statements in the proxy that are rendered false or misleading by the omission, and how they are rendered false or misleading. With these pleading requirements in mind, I turn to plaintiffs' claims.

Plaintiffs allege the Proxy omitted the facts that:

the "Other Organization" was North Fork; that North Fork owned over 80% of the Greater's Series B preferred stock and 625,000 shares of its common stock; that North Fork made repeated requests and was denied the opportunity, to make a presentation to The Greater's board and to conduct due diligence; that North Fork was asked if Keegan would have a major role following the merger and that it responded that Keegan would not play a major role; that North Fork assured The Greater that it would not reduce its bid upon completing due diligence; that The Greater had stated it did not want to talk with North Fork; and that, even if North Fork increased its bid, The Greater's directors would not have agreed to a transaction with North Fork. None of these allegations is different from the first amended complaint. Instead, plaintiffs present new arguments in the complaint that the omission of those facts misled shareholders because they did not know North Fork was genuinely interested in a merger with The

Greater and that The Greater refused its overtures. However, plaintiffs do not allege what statements in the Proxy those omissions render false or misleading. Proxy statements concerning the Other Organization are:

> On March 17, 1997, Mr. Keegan received a call from the chief executive officer of another banking organization (the "Other Organization") expressing an interest in acquiring GNYSB.
>
> Mr. Keegan reported the contact with the chief executive officer of the Other Organization to the GNYSB Board at a special meeting on March 17, 1997. At this meeting he also reported the results of his meeting with Mr. Engelke and the GNYSB authorized the further consideration of a possible combination with AFC, including due diligence on GNYSB and AFC, and the further consideration of GNYSB's strategic alternatives....
>
> Subsequently, the chief executive officer of the Other Organization initiated a series of telephone calls with Mr. Keegan and GNYSB's investment bankers, Sandler O'Neill, regarding its interest in GNYSB and seeking the opportunity to make a proposal regarding a possible business combination with GNYSB. As part of these discussions and at the request of the GNYSB, the Other Organization submitted a letter intended to address its views on how an acquisition by it would impact the communities and customers served by GNYSB and its employees.
>
> ....
>
> As part of the GNYSB Board's deliberations, it instructed Sandler O'Neill to contact the Other Organization to inquire as to the consideration it would be willing to provide to GNYSB's shareholders

> in a combination with GNYSB and its ability to move expeditiously to sign a definitive agreement with respect to such a transaction. The Other Organization responded with a proposal that involved a combination conditioned on "pooling of interests" accounting treatment and consideration consisting of a fixed exchange ratio of the Other Organization's common stock that had a value of $18.53 per share of GNYSB Common Stock based on the closing price of the Other Organization's common stock on March 27, 1997. Sandler O'Neill asked the Other Organization to increase its price and it declined to do so. The Other Organization also indicated that it could move expeditiously to enter into a definitive agreement. This proposal was immediately communicated to the GNYSB Board.

(PS at 35-36.)

The identity of the Other Organization cannot be said to render any of these disclosures false or misleading. Plaintiff's allegation that North Fork owned over 80% of the Greater's Series B preferred stock and 625,000 shares of its common stock also does not render anything quoted above false or misleading, particularly given that elsewhere the Proxy explains that the Series B preferred stock is non-voting stock and could not affect the outcome of the merger. While the omitted facts may show that North Fork was a genuinely interested in a merger and was not allowed to meet with The Greater's Board, plaintiffs do not offer any arguments as to what statements in the Proxy are rendered misleading by the omission. In fact, the Proxy expressly states that the Other Organization was willing to move expeditiously to enter into a definitive agreement." As an omission must make some part of the Proxy misleading, *see* 17 C.F.R. § 240.14a-9(a) (1997), plaintiffs' claim on this issue is dismissed.

Plaintiffs allege that the statement in the Proxy that "Sandler O'Neill asked the Other Organization to increase its price and it declined to do so" is either affirmatively false or misleading, because North Fork said that it would not increase its price absent due diligence, which it requested the opportunity to perform. Plaintiffs allege that Kanas represented to Quackenbush that North Fork's bid would not go down after due diligence. Plaintiffs argue that a material difference exists between declining to raise one's price and declining to raise one's price absent due diligence. Plaintiffs argue in their supporting memoranda that Kanas' assurance against a decrease raises the inference that North Fork's offer would increase. Such inference would render the Proxy statement false. Defendants argue that no such inference is warranted and that there is no material difference between declining to increase the bid and declining to increase the bid without due diligence.

The Supreme Court has held that in a merger situation materiality will depend "'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *Basic, Inc. v. Levinson,* 485 U.S. 224, 238 (1988) (quoting *SEC v Texas Gulf Sulphur,* 401 F.2d 833, 849 (2d Cir. 1968) (en banc)). Under *Basic,* "[w]hether merger discussions in any particular case are material ... depends on the facts," and in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels." *Id.* at 239. In looking to these indicia, the court must consider, among other things, "board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries." *Id.*

This Circuit has noted that in a merger context "information can be speculative and tenuous," *SEC v. Mayhew,* 121 F.3d 44, 52 (2d Cir. 1997). Further, "[t]he

mere fact that a company has received an acquisition overture or that some discussion has occurred will not necessarily be material. 'Those in business routinely discuss and exchange information on matters which may or may not eventuate in some future agreement.'" *Glazer v. Formica Corp.*, 964 F.2d 149, 155 (2d Cir. 1992) (quoting *Taylor v. First Union Corp.*, 857 F.2d 240, 244 (4th Cir. 1988)).

Mr. Kanas' statement that North Fork's bid will not go down does not give rise to the inference that North Fork's bid would increase after due diligence as plaintiffs suggest. The facts as alleged clearly indicate that when Quackenbush specifically asked Kanas if the bid would go up after due diligence, Kanas replied that the offer would not go down. In their memorandum of law, plaintiffs insist that Kanas' response requires the Court to accept as fact that the bid would increase. In a motion to dismiss, however, a court should not accept as true conclusory allegations. *See Dc Jesus v. Sears Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996); *Palda v General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12 (b) (6)."); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) ("'[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'") As the facts as alleged do not give rise to the inference that a higher bid was assured, the Proxy statement that North Fork declined to raise its bid cannot be considered affirmatively false.

The omission from the Proxy that North Fork's offer might have increased after due diligence cannot be considered material because The Greater was not interested in a merger with North Fork. *See Glazer v. Formica Corp.*, 964 F.2d at 155. The complaint makes clear that at the "highest levels" of The Greater's management, as expressed

by the Board to its investment bankers, North Fork was not going to acquire The Greater even if Astoria was not in the picture. Mr. Keegan's first conversation with a North Fork officer resulted in Keegan's disavowing any interest in North Fork. In fact, the complaint specifically alleges that The Greater's Board of Directors would not have agreed to a transaction with North Fork. The statement that "Sandler O'Neill asked the Other Organization to increase its price and it declined to do so" is neither false nor misleading. The fact omitted, that North Fork wanted to do due diligence, is not material because The Greater's management was not interested in merging with North Fork absent an unconditional higher bid. *See Basic, Inc. v. Levinson,* 485 U.S. at 238. For those reasons, this aspect of the second amended complaint fails to state a claim.

Plaintiffs also allege that the Proxy does not disclose that North Fork's offer was larger than Astoria's if valued on an after-tax basis. Plaintiffs made the same allegation in the first amended complaint and it was dismissed. Plaintiffs allege that North Fork's all stock bid will defer taxes while the cash portion of Astoria's bid will be immediately taxed. Plaintiffs allege that the omission renders the entire fairness opinion by Sandler O'Neill false. Plaintiffs contend that the nondisclosure of the tax neutrality of North Fork's bid is misleading because it implies that all transaction would have an immediate tax consequence. Plaintiffs' argument is wrong. The Proxy adequately sets forth the tax consequences of the Astoria merger, explaining the tax implications of receiving cash in exchange for shares. Within a four-page section entitled "Material Federal Tax Consequences," the Proxy discloses that "the tax treatment of each GNYSB stockholder will depend in part upon such stockholder's particular situation and the consideration received by such stockholder pursuant to the merger." (PS at 59.) it further states that "no gain or loss will be recognized by a GNYSB stockholder who receives solely AFC Common Stock for

such stockholder's shares of GNYSB Common Stock," and that "[a] GNYSB stockholder who receives both AFC Common Stock and cash ... will recognize gain, but not loss, to the extent of the lesser of" the amount of cash received or the difference between the fair market value of AFC stock and the stockholder's basis in the GNYSB stock. (PS at 60.) The Proxy further explains that the Other Organization's offer was for all stock. (PS at 36.) From this, a shareholder, if interested, could readily perform the necessary mathematical calculations to determine, based on his or her own tax rate and basis in the GNYSB stock, which offer was, for her, higher. In suggesting that the shareholders needed to be told that different transaction structures would result in different tax treatments, plaintiffs ignore the Supreme Court's admonishment that the purpose of the securities laws is to disclose, not to treat the shareholders like "'nitwits'" or to "'attribute to investors a child-like simplicity.'" *Basic,* 485 U.S. at 234 (quoting *Flamm v. Eberstadt,* 814 F.2d 1169, 1175 (7th Cir. 1987)). Furthermore, the Second Circuit has recognized that discussions of the personal tax ramifications of proposed corporate transactions are beyond the scope of the securities laws. *See Mendell v. Greenberg,* 927 F.2d 667, 676 (2d Cir. 1990), *amended,* 938 F.2d 1528 (1991). Plaintiffs allege that Astoria's bid was $18.95 per share before tax and that North Fork's bid was $18.53 per share after tax. As the true value of each bid depends on the tax situation of individual shareholders, North Fork's bid cannot be considered materially higher, rendering the Sandler O'Neill opinion affirmatively false. Since plaintiffs' alleged omission, that the Astoria offer was lower on an after-tax basis than the North Fork offer, is fully disclosed to the extent necessary, the amended complaint does not properly state a claim under Rule 14a-9 on this issue.

Plaintiffs allege that the Proxy statement did not disclose that North Fork's offer was higher than Astoria's bid even before considering tax consequences. Plaintiffs allege

that North Fork offered .486 of a North Fork share for every The Greater share in March 1997. North Fork's offer was worth $22.29 a share on June 24, 1997, the date the Proxy was released, because North Fork's share price appreciated since March 1997. In contrast, Astoria's offer was worth $21.95 per share on June 24, 1997. Plaintiffs calculate Astoria's offer in the following way. Plaintiffs assume that all The Greater's shareholders would elect to receive Astoria stock and since Astoria's offer was for 75% stock and 25% cash, the value of Astoria's offer would be a blend of the stock and cash. Seventy-five percent of the $22.937 value of half a share of Astoria stock on June 24, 1997, was $17.20. Twenty-five percent of the $19 cash portion was $4.75 and the blended total was $21.95.

Plaintiffs contend that the omission of North Fork's higher offer as valued on June 24, 1997, was a violation of Rule14a-9 because the information was material. Plaintiffs' argument overlooks several important points. As alleged in the complaint, North Fork's offer was rejected by The Greater's Board on March 27, 1997. At the time of the Board meeting, Astoria's bid was higher than North Fork's offer. The Proxy discloses that offer. Plaintiffs do not allege that North Fork communicated renewed interest in merging after the March 27, 1997 Board meeting. Instead, plaintiffs point to the value of North Fork's offer based on the rejected exchange ratio. There are no allegations that North Fork would have continued to offer the same exchange ratio. Disclosure of the value of North Fork's possible offer would itself have been misleading because it would have given shareholders the impression that North Fork's proposal was still open and at the same exchange ratio. *See Krauth v. Executive Telecard, Ltd.*, 890 F. Supp. 269, 288-89 (S.D.N.Y. 1995). Furthermore, as disclosed in the Proxy, the actual value of Astoria's offer depended on two circumstances that were unknowable at the time the Proxy statement was issued: Astoria's stock price and the elections by The Greater's

shareholders to receive cash or stock. The election made by the shareholders was to be made two weeks after the consummation of the merger. The value of Astoria's offer changes with the number of shareholders who elect to receive stock. Depending on the outcome of the elections, Astoria's bid was higher or lower than North Fork's offer. "Section 14 carries with it no formal requirement that predictions be made as to future behavior, and indeed they are discouraged." *Krauth v. Executive Telecard, Ltd.*, 890 F. Supp. *at* 288-89 (quoting *Marks v. Lainoff, 466* F. Supp. 301 302-03 n. 1 (S.D.N.Y. 1979)). As plaintiffs' allegation that North Fork's offer was higher that Astoria's rests on events unknowable before the issuance of the Proxy statement, it fails to state a claim.

Before turning to plaintiffs' state law claims, I address the federal claims against the individual defendants. The second amended complaint alleges that the Outside Directors are liable as direct or indirect participants in the asserted violations of federal law and as aiders and abettors of the asserted state law violations. (Second Am. Compl. at ¶16). The Outside Directors are alleged to have been;

> intricately and directly or indirectly involved in: (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or otherwise, between The Greater, Astoria, North Fork, and Christopher Quackenbush; (iii) the negotiation process as alleged more fully herein; (iv) all Board of Directors meetings of The Greater; (v) preparing, reviewing, editing, commenting, approving, filing and disseminating the contents of the Proxy/Prospectus; and (vi) the decision to solicit the votes of shareholders. (Second Am. Compl. at 13.)

Under Rule 14a-9, plaintiffs dc not need to show that

the omissions and misrepresentations resulted from knowing conduct by the Outside Directors. *See Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973). Negligence in drafting the proxy statement by corporate insiders can result in liability. *See Wilson v. Great American Indust., Inc.*, 855 F.2d 987, 995 (2d Cir. 1989). However, as seen above, the plaintiffs have not plead a material misrepresentation or omission. No liability can attach to the individual defendants if there is no predicate omission or misrepresentation. *See United Paperworkers Int'l Union v. International Paper Co.*, 985 F.2d at 1198. Even if the misrepresentations were material, when outside directors are sued, a plaintiff must plead that outside directors knew of the facts that were omitted from the Proxy. *See Salit v. The Stanley Works*, 802 F. Supp. 728, 733 (D. Conn. 1992). Here, the plaintiffs do not plead that the Outside Directors knew the omitted facts. The compliant states that Quackenbush reported his conversations with Kanas to the Board. Plaintiffs do not plead that the Outside Directors were told that North Fork required due diligence and would not lower its bid after due diligence. Consequently, the Outside Directors could not be liable without an allegation of this knowledge.

The second amended complaint does not allege any facts in support of its contention that the individual defendants knowingly participated in The Greater's breach of fiduciary duties, an essential element of a claim for aiding and abetting liability. *See S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847 (2d Cir. 1987). Similarly, the complaint alleges no facts demonstrating that any of the individual defendants knew of and substantially assisted a violation of the securities laws by The Greater and, thus, fails to state a claim of aiding and abetting a securities law violation. *See National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206-07 (2d Cir. 1989). As against the individual defendants, the second amended complaint does not state a claim upon which relief can be granted.

Having dismissed plaintiffs' federal claims, I decline to exercise pendent jurisdiction over their state law claims.

Under Section 1367 (c), I may "decline to exercise supplemental jurisdiction over" plaintiffs' state law claims if "the claim raises a novel or complex issue of State law" or if I have "dismissed all claims over which [this Court] has original jurisdiction." In the present case, both rationales are applicable. Plaintiffs have, since the outset of this litigation, sought to hold defendants liable for violations of the norms embodied in the Delaware courts' takeover jurisprudence. I noted in *Minzer I* that Delaware law does not apply and that New York law differs substantially from Delaware law in relevant aspects. The degree to which the New York courts wish to follow Delaware law in the context of a corporate merger is a question best resolved in New York State court. Plaintiffs implicitly recognized this by first seeking redress in the courts of New York. While the parties have stipulated to a dismissal of the state court action, that dismissal is without prejudice. Accordingly, the plaintiffs will be able to return this case to its proper forum, and I thus decline to exercise jurisdiction over the state claims in the absence of a well-pled federal claim.

Under the Reform Act, at the conclusion of this litigation I am obligated to "include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any ... dispositive motion," 15 U.S.C. § 78u-4(c)(l), and am required to impose sanctions for a violation of such rules. *Id.* at § 78u-4(c) (2).

As to the defendants, I find nothing in their motion papers suggestive of a Rule 11 violation. I similarly find no violations of Rule 11 in the plaintiffs' papers. Having not

made any determination as to the merits of plaintiffs' state law claims, I cannot find that this action was "presented for any [im]proper purpose, such as to harass." Fed. R. Civ. P. 11(b) (1).

For the reasons stated above, defendants' motion is granted in its entirety, and the complaint is dismissed.

The Clerk of the Court is directed to enter judgment dismissing the complaint and to furnish a filed copy of the within to all parties and to the magistrate judge. So Ordered,

Dated : Brooklyn, New York January 25 1999

Docket No. 99-7199

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

v.

GERALD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. DE NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP., ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and ASTORIA FEDERAL SAVINGS & LOAN, Defendants-Appellees,

MICHAEL HENCHY, DANIEL J. HARRIS, PHILIP CIMINO, PHILIP SPIES, and R. CARLSON,
Defendants.

Filed: September 26th, 2000

ORDER

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Minzer, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

97 CIV 4077 (CPS)(CLP)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated,
Plaintiffs,

-against-

GERARD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. de NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., THE GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP. and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION
Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT
CORRECTED COPY

Plaintiffs, for their second amended class action complaint against the defendants, allege the following upon personal knowledge as to themselves and their own acts and based on the investigation conducted by their attorneys, including a review of the public filings of The Greater New York Savings Bank ("The Greater" or the "Company") and expedited document and deposition discovery conducted in this litigation.

SUMMARY OF ALLEGATIONS

1. This action is brought as a class action on behalf of all The Greater shareholders, as hereinafter defined, to address proxy violations and breaches of trust and of

fiduciary duty to The Greater's shareholders by the Company's directors and one officer, who, as a result of the wrongful conduct complained of herein have solicited the vote of shareholders and consummated a merger transaction under false pretenses, have breached their fiduciary duties of care, loyalty and good faith, and have abused the control reposited in them by virtue of their high level positions, all to benefit their own interests at the detriment of the Company's public shareholders.

2. This action initially sought to obtain compliance with proxy and fiduciary obligations and to enjoin the acquisition of the Company and the receipt of special benefits by its officers and directors, or, alternatively, to seek rescission and damages resulting from the proxy violations by all of the defendants and from violations of common law fraud and breaches of trust and of fiduciary duty to The Greater's shareholders by The Greater's officers and directors. In view of the Court's denial of plaintiffs' motion for a preliminary injunction, its dismissal of the preceding complaint without prejudice, and the consummation of the merger complained of, in this amendment plaintiffs seek rescission and damages resulting from the proxy violations by all of the defendants and from violations of common law. This amendment addresses the deficiencies found by the Court in its Memorandum and Order dated June 1, 1998. Plaintiffs expressly reserve their right to appeal said Order and have repleaded in order to obviate any appeal, if possible.

3. The underlying transaction involved an acquisition by merger of the Company by Astoria Financial Corp. and Astoria Federal Savings and Loan Association (collectively "Astoria") by means of false, misleading and inadequate disclosure, unfair dealing and at an unfair price. Pursuant to the terms of the transaction, The Greater shareholders exchanged each share of the Company's common stock for either .50 shares of Astoria common stock or $19 in cash for each share, pursuant to an election procedure as described in the agreement, subject to 75% of The Greater shares receiving

Astoria shares and 25% receiving cash. The merger closed on September 30, 1997. The actual consideration received by The Greater shareholders pursuant to the election procedure totaled .3861358 shares of Astoria stock and $4.33 in cash for each share of The Greater for those electing stock (97%), and $19.00 per share for the remaining shareholder. Also, since the closing of the transaction, Astoria sold approximately $223 million of real estate assets and loans acquired from The Greater.

4. Plaintiffs allege, as more fully set forth below, that:

(a) The "Other Organization" not identified in the Joint Proxy Statement/Prospectus (the "Proxy Statement" or "Proxy/Prospectus") is North Fork Bancorporation, Inc. ("North Fork"), which owned 1,600,000 shares, or approximately 82%, of The Greater's Series B Preferred Stock and 625,000 shares of its common stock;

(b) The representation in the proxy that the Other Organization was asked to increase its price and it declined to do so is false. North Fork had repeatedly requested the opportunity to meet with and make a presentation to The Greater's management and Board of Directors (the "Board") and to conduct due diligence. It was denied those opportunities which were provided to Astoria. North Fork's Chairman went so far as to campout in front of The Greater's executive offices in a vain attempt to address its Board. When North Fork's Chairman made his bid by telephone and was asked to increase it, he did not decline to do so. Rather, he responded: "that was our best bid until such time as we would be allowed to go in and examine the books and records of the company and do what is commonly referred to as due diligence. I informed [The Greater's investment banker] that there was a team of bank officers out in Melville that were ready to work over the Easter weekend to come in and do that study and that we were prepared to refine our bid and deliver it to them by Monday morning. That would be the day after Easter. And that we were unwilling to raise our price until such time as we had a chance to look at the books and records." In fact, when pressed

further to raise his bid for The Greater by its representative, North Fork's Chairman emphatically stated that his price would not go down.

(c) When North Fork was asked for its bid, it was requested "to include the price, the terms and, any consideration as to social issues that might be embodied within the bid." The "social issues" did not concern community or customer relations or lending policies, but rather North Fork's "attitude toward the board and toward Mr. Keegan." North Fork was "asked if Mr. Keegan could expect to have an active role and if there was any other, if there was, in quotes, I believe he said a major role for him to play." North Fork responded that there was not.

(d) Defendant Keegan's one and only noted "concern" in negotiations with Astoria was that he "have a position acceptable to peers throughout." He since became a director, Vice Chairman and Chief Administrative Officer of Astoria. All of The Greater's directors, including the purportedly outside directors, were to serve on an Astoria Advisory board for a term of three years. Their demand to be paid $50,000 and 4,000 options for each director, each year, was too much even for Astoria, which agreed to pay them $24,000 per year and 4,000 options.

(e) Christopher Quackenbush, The Greater's investment banker and a former attorney with Skadden, Arps, Slate, Meagher & Flom ("Skadden Arps"), took notes of the telephone conversation in which he requested and North Fork's Chairman set forth the terms of his offer to acquire The Greater and notes of The Greater's March 27, 1997 Board Meeting at which the merger agreement with Astoria was approved. He threw out all his notes "Because I always do. I do it. It was one of the first things they taught me at Skadden Arps, which was if you take notes at a meeting . . . handwritten notes I throw out."

(f) Defendant Keegan also took notes at The Greater's Board meetings. They, too, have been either destroyed or discarded.

(g) The Greater does not have any minutes or notes of its March 19, 1997, March 27, 1997, or March 29, 1997 Board meetings.

(h) North Fork's March 27, 1997 offer was tax neutral and, therefore, was a materially higher offer than Astoria's.

(i) North Fork's March 27, 1997 offer as reflected in market prices at or about the time of the shareholder vote was higher than Astoria's.

(j) North Fork continued to remain interested in acquiring The Greater and if plaintiffs' application to enjoin consummation of the merger with Astoria were granted, it would have considered making a higher offer, subject to due diligence.

5. The merger agreement provided for a $5 million breakup fee (the "breakup fee") which was required to be paid to Astoria if the transaction were terminated and a Stock Option Agreement granted Astoria a lock-up option to purchase shares equal to 19.9% of currently outstanding common shares of The Greater under certain conditions (the "lock-up option"). In addition, to induce the members of the Board of Directors of The Greater to agree to the terms of the merger, it provided that immediately prior to the effective time of the merger, the directors of Astoria would (and did) cause defendant Keegan and one other member of The Greater Board selected by The Greater to be elected and appointed to the Astoria Board and all of the non-officer members of the Board of The Greater to serve as members of the Advisory Board of Astoria at an annual retainer fee of $24,000 and an option to purchase 4,000 shares of Astoria common stock, with retirement benefits. Finally, at the effective time, defendant Keegan became Vice Chairman and Chief Administrative Officer of Astoria.

6. The actions of the director defendants in causing The Greater to engage in this pattern of unlawful conduct as alleged are material with respect to the director defendants' integrity and ability to discharge their stewardship

obligations to the Company. The director defendants' actions have harmed The Greater's shareholders.

JURISDICTION AND VENUE

7. This Court has jurisdiction of this matter pursuant to Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, and 28 U.S.C §§ 1331 and 1337, in that defendants have committed unlawful acts in violation of the Exchange Act and the rules and regulations of the SEC promulgated thereunder, have done so by the use of the means of interstate commerce and the mails, and pursuant to principles of supplemental jurisdiction under 28 U.S.C. § 1367.

8. Venue is proper in this District pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1391(b) and (c). Acts and transactions constituting the violations complained of have taken place in this District and the defendants are present, found and transact business in this District.

PARTIES

9. Plaintiff Leonard Minzer has been a stockholder of the Company at all times relevant to the allegations herein. Plaintiff Leonard Minzer resides in this District.

10. Plaintiff Harry Schipper has been a stockholder of the Company at all times relevant to the allegations herein.

11. Prior to the merger here at issue, The Greater was a New York chartered capital stock savings bank and had its principal offices at One Penn Plaza, New York, New York. Publicly traded on the NASDAQ, the number of shares outstanding of The Greater's common stock and entitled to vote at the meeting to approve the merger with Astoria totaled 13,714,485.

12. Defendant Gerard C. Keegan ("Keegan") was at all relevant times, a Director, Chairman of the Board of Directors, Chief Executive Officer and President of the Company. Defendant Keegan was intricately and directly involved in: (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or

otherwise, between The Greater, Astoria, North Fork, and Christopher Quackenbush, the Company's investment banker; (iii) the negotiation process as alleged more fully herein; (iv) all Board of Directors meetings of The Greater; (v) preparing, reviewing, editing, commenting, approving, filing and disseminating the contents of the Proxy/Prospectus; (vi) destroying or discarding notes taken at Board meetings; and (vii) the decision to solicit the votes of shareholders. His one and only noted "concern" in negotiations with Astoria was that he "have a position acceptable to peers throughout." Indeed, when North Fork was invited to bid, The Greater's Board, through its investment banker, asked North Fork "to include the price, the terms, and any consideration as to social issues that might be embodied within the bid." The "social issues" did not concern community or customer relations or lending policies, but rather North Fork's "attitude toward the board and toward Mr. Keegan." North Fork was "asked if Mr. Keegan could expect to have an active role and if there was any other, if there was, in quotes, I believe he said a major role, for him to play." North Fork responded that there was not.

13. Defendants Philip F. Ruppel, George H. Sorter, Gwendolyn Calvert Baker, William F. de Neergaard, James G. Peel, C. Stephen Connolly, William F. Ward, Nicholas A. Marshall and Peter C. Haeffner, Jr., were at all times relevant to this action directors of The Greater. These director defendants were intricately and directly or indirectly involved in: (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or otherwise, between The Greater, Astoria, North Fork, and Christopher Quackenbush; (iii) the negotiation process as alleged more fully herein; (iv) all Board of Directors meetings of The Greater; (v) preparing, reviewing, editing, commenting, approving, filing and disseminating the contents of the Proxy/Prospectus; and (vi) the decision to solicit the votes of shareholders.

14. Defendant Astoria Financial Corp. ("AFC") is a Delaware corporation, having its principal place of business in

this District at One Astoria Federal Plaza, Lake Success, New York, and is the holding company for defendant Astoria Federal Savings and Loan Association ("AFS"). The principal business of AFC is the operation of AFS. Either on its own accord or through AFS, AFC was directly or indirectly involved in: (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or otherwise, between The Greater, Astoria, North Fork, and Christopher Quackenbush; (iii) the negotiation process as alleged more fully herein; (iv) preparing, reviewing, editing, commenting, approving, filing and disseminating the contents of the Proxy/Prospectus; and (v) the decision to solicit the votes of shareholders. Astoria signed the Proxy/Prospectus as it related to the Registration Statement which it executed. Thus, the mailing of the Proxy/Prospectus to The Greater shareholders in connection with the transaction was effected by both Astoria and The Greater.

15. Defendant AFS, a federally chartered savings and loan association, is a wholly owned subsidiary of AFC. AFS also has its principal place of business in this District at One Astoria Federal Plaza, Lake Success, New York 11042-1085. At all relevant times, AFS' principal business was attracting retail deposits from the general public and investing those deposits, together with funds generated from operations, principal repayments and borrowings, primarily in one-to-four family residential mortgage loans and mortgage-backed and mortgage-related securities, securities issued by the U.S Government and Federal agencies and other securities. Since the closing of the merger complained of, Astoria has completely absorbed The Greater's operations, offices and business. Either on its own accord or through AFC, AFS was directly or indirectly involved in: (i) the underlying transactions and occurrences complained of; (ii) the communications, whether face to face or otherwise, between The Greater, Astoria, North Fork, and Christopher Quackenbush; (iii) the negotiation process as alleged more fully herein; (iv) preparing, reviewing, editing, commenting, approving, filing and

disseminating the contents of the Proxy/Prospectus; and (v) the decision to solicit the votes of shareholders.

16. Each of the individual defendants and the Astoria defendants are liable as direct or indirect participants in the asserted violations of federal law, and with respect to the state law claims also as aiders and abettors for at least the reasons set forth in the preceding paragraphs. In addition, because of: (i) each of the defendants' positions of control and authority as participants in the underlying transaction complained of and the negotiations thereof; (ii) with respect to defendant Keegan, his executive and operating offices; (iii) and with respect to the individual defendants their directorial positions at the Company, each of them was able to and did, directly or indirectly, control the conduct of The Greater's business and employees or abdicated their functions in connection with the disclosure and state law violations set forth herein.

CLASS ACTION ALLEGATIONS

17. Plaintiffs bring this action on their own behalf and as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all security holders of the Company since April 1, 1997 (except the defendants herein, members of their immediate families, and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants) and their successors in interest.

18. The class is so numerous that joinder of all members is impracticable. The number and identity of the members of the class of The Greater securities can be ascertained from the books and records of the Company and/or its agents. The members of the class are scattered throughout the United States.

19. There are questions of law and fact which are common to the class and which predominate over questions affecting any individual class member. The common questions include, inter alia, the following:

(a) whether defendants participated in and/or pursued a course of conduct complained of herein by making

solicitations by means of the Joint Proxy Statement/Prospectus containing statements that, at the time and the circumstances under which they were made, were materially false and misleading or omitted to state material facts necessary in order to make the statements therein not false or misleading;

(b) whether defendants' acts, as alleged herein, violated the federal securities laws, specifically Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder;

(c) whether the defendants acted knowingly, purposefully, deliberately, willfully, culpably, recklessly, or negligently, in disseminating the Joint Proxy Statement/Prospectus which contained materially false and misleading statements and which omitted to disclose material facts relating to an offer by North Fork to enter into a business combination with The Greater;

(d) whether the individual defendants, singly or in concert, engaged in the aforesaid conduct, and/or intentionally breached and/or recklessly disregarded their fiduciary duties of loyalty, care and good faith to the Class;

(e) whether the individual defendants abused the control reposited in them by virtue of their high-level positions in the Company and have engaged in a plan and scheme to deceive the public stockholders of The Greater and to enrich themselves at the expense of the Company's public stockholders;

(f) whether plaintiffs and the other members of the class were irreparably damaged by the transaction complained of herein;

(g) whether plaintiffs and the class are entitled to equitable relief as a result of the merger between The Greater and Astoria;

(h) whether plaintiffs and the class are entitled to rescission; and

(i) whether plaintiffs and the class are entitled to an award of compensatory and punitive damages.

20. Plaintiffs are committed to prosecuting this

action and have retained competent counsel experienced in litigation of this nature. The claims of plaintiffs are typical of the claims of the other members of the class and plaintiffs have the same interests as the other members of the class. Plaintiffs are adequate representatives of the class and have and will continue to fairly and adequately protect the interests of the class.

21. The likelihood that individual members of the class will prosecute separate individual actions is remote due to the burden and expense of prosecuting litigation of this nature and magnitude. Plaintiffs anticipate that there will not be any difficulty in the management of this litigation.

22. For the reasons stated herein, a class action is superior to other available methods for the fair and efficient adjudication of the controversy and the requirements are satisfied.

SUBSTANTIVE ALLEGATIONS

23. By the acts, transactions and courses of conduct alleged herein, the defendants, individually and as part of a common plan or scheme have, in violation of the federal securities laws and in total disregard of their respective fiduciary duties, pursued a plan to benefit themselves and to mislead the Company's public stockholders in connection with soliciting their proxies through false pretenses by misrepresenting and concealing material information, considerations, and evaluations relating to the merger, and to divest plaintiffs and the other members of the class of their investments in the Company at a grossly inadequate price and as a result of unfair dealing.

24. In January 1997, George L. Engelke, Jr. ("Engelke"), the Chief Executive Officer of Astoria and defendant Keegan met at Mr. Engelke's request to discuss the concept of a possible combination of the two institutions.

25. On or about February 26, 1997, following a meeting of North Fork's Board and the preparation of several acquisition models, Thomas M. O'Brien ("O'Brien"), Vice Chairman of North Fork, telephoned defendant Keegan and

informed him that North Fork had acquired 1.6 million shares of The Greater Series B Preferred Stock, or approximately 82% of those shares, and is interested in discussing a combination with The Greater. Mr. Keegan responded that he had no interest in a conversation with respect to any business combination between the two institutions.

26. On Sunday, March 16, 1997, Messrs. Engelke and Keegan again met at Mr. Engelke's request to permit Mr. Engelke to explain the benefits which a combination of the two institutions would have. The meeting took place at Mr. Engelke's residence in Garden City, New York, where both Messrs. Engelke and Keegan reside. Mr. Engelke indicated that Astoria would be willing to pay approximately $18 per share for The Greater's shares, the consideration to be paid in part cash and in part stock, and that Astoria would be willing to consider a higher price subject to the results of its due diligence as well as various different combinations of cash and Astoria stock.

27. On March 17, 1997, St. Patrick's Day, John A. Kanas, Chairman of the Board and Chief Executive Officer of North Fork, telephoned defendant Keegan at 10:00 a.m. and informed him that North Fork had made a substantial investment in The Greater and had a serious interest in sitting down with Mr. Keegan and talking to him about a strategic combination of the two companies.

28. Mr. Keegan responded by stating that a strategic combination or merger of The Greater with another bank was not in its plan and that he did not want to talk to North Fork under any circumstances, even though he did not know what price North Fork might be willing to offer.

29. Mr. Keegan's statement that a strategic combination or merger of The Greater with another bank was not in its plan was false. At a special meeting of The Greater Board later on the same day of March 17, 1997, Mr. Keegan reported the contact with Mr. Kanas and the results of Mr. Keegan's meeting with Mr. Engelke. The Board authorized the further consideration of a possible combination with Astoria,

including due diligence.

30. There are no surviving Board minutes or notes of the March 17, 1997 meeting.

31. Later that day, Mr. Kanas drafted a letter to defendant Keegan in which he expressed his disappointment at Mr. Keegan's "refusals to accommodate our requests to have an informal meeting in order to discuss the merits of a possible business combination", noting that "North Fork owns approximately 1.6 million shares of The Greater Series B Preferred Stock, or approximately 82% of the outstanding shares of issue, placing us in a unique position to effect a successful combination." (North Fork also acquired approximately 600,000 shares of The Greater's common stock by March 1997.) The letter further noted that there were opportunities for significant cost savings and earnings enhancements. Finally, the draft letter stated that North Fork was prepared to offer .5 shares of its common stock for each outstanding common share of The Greater, which at that day's values would give each Greater shareholder "approximately $19.00 worth of North Fork stock in a tax free exchange" and a 125% increase in cash dividends. The offer was expressly made subject to "customary due diligence procedures by all of the parties."

32. That evening, Messrs. Keegan, O'Brien and Quackenbush, a principal at Sandler O'Neill & Partners, L.P. ("Sandler O'Neill"), the investment banking firm representing The Greater, dined, together with others, at a St. Patrick's Day dinner. Mr. Quackenbush suggested to Mr. Kanas, either that day or the next, that his client, The Greater, was willing to reconsider and speak with him by telephone on Wednesday, March 19, 1997 and that Mr. Kanas should defer the sending of the draft letter.

33. On March 19, 1997 at 3:35 p.m. Mr. Kanas telephoned defendant Keegan and informed him of North Fork's efforts in community and customer relations, adding that North Fork places "the interest of the owners of the company upfront." Mr. Keegan stated that The Greater would have a

Board meeting the following week and that he would relate the conversation to the Board and see where they will go from there.

34. On March 21, 1997, at the suggestion of Mr. Quackenbush that a milder form of letter than the one which Mr. Kanas had drafted on March 17, 1997 be sent to The Greater, Mr. Kanas wrote to defendant Keegan, thanking him for accepting his call on Wednesday, expressing recognition of the importance of community involvement, and noting that North Fork "enjoys an excellent reputation with the investment community based upon our track record of financial performance over the last five years. I urge you to consider that this performance could not have been achieved by an organization whose people are insensitive to the very matters you and I discussed." Mr. Kanas concluded by stating that he looks forward "to being able to sit down with you next week in order to explain in more detail our view of the future and the benefits each of our shareholder groups would derive from a merger of our resources."

35. Neither defendant Keegan nor any other representative of The Greater ever responded to Mr. Kanas' letter, and Mr. Kanas was never given the opportunity to meet with defendant Keegan or The Greater Management or Board.

36. Between March 19 and March 27, 1997, Mr. Kanas also had several telephone conversations with Mr. Quackenbush in which he urged that a meeting be held between himself and The Greater's Board or other representatives in order to make a presentation which North Fork had prepared. North Fork was denied the opportunity to make a presentation.

37. Mr. Quackenbush was also told by Mr. O'Brien between March 19 and March 27, 1997, that in the absence of due diligence, North Fork did not know if everything was as it had modeled it or presumed it to be and that diligence was very important and was necessary before making any kind of final offer.

38. Nevertheless, North Fork was denied the

opportunity to conduct due diligence.

39. By contrast, Astoria was furnished due diligence which continued through a special meeting of The Greater's Board on Thursday, March 27, 1997. Mr. Kanas, who had been told that the Board would be meeting that day, went to New York City where he spent the day in order to be available to speak to The Greater's Board. At approximately 6:00 p.m., camped outside The Greater's executive offices, he received a call on his cellular phone from Mr. Quackenbush, who was at a meeting of The Greater's Board at the offices of its counsel, Sullivan & Cromwell. Mr. Kanas told Mr. Quackenbush that he was in New York City and "was available that moment to come speak to the board and was desirous of doing so." Mr. Quackenbush told him that would not be necessary.

40. At Mr. Quackenbush's request, Mr. Kanas called him back on a noncellular telephone. Mr. Quackenbush told him that The Greater's Board "was desirous of knowing our bid and in as much detail as I could give him, to include the price, the terms, and any consideration as to social issues that might be embodied within the bid." Mr. Kanas responded that he "much preferred to get before the board and make that bid in person." Mr. Quackenbush stated that his instructions from the Board were to solicit the bid over the telephone. Mr. Kanas was denied the opportunity to appear before the Board.

41. Mr. Kanas then informed Mr. Quackenbush that North Fork was ready to make a bid and propose a transaction contingent upon a pooling accounting treatment and a tax free exchange of shares with an exchange ratio of .486 shares of North Fork common stock for each share of common stock of The Greater. He said that, unfortunately, North Fork stock closed down for the day and indicated that, but for that decline, the value of the offer would be approximately $19.00 per share.

42. With respect to "social issues", Mr. Quackenbush was not referring to community or customer relations or lending policies, but rather "asked our attitude toward the board and toward Mr. Keegan and asked me to

enunciate our proposal." Mr. Kanas responded that North Fork "would probably be willing to give them one board seat and that was somewhat negotiable, and that if Mr. Keegan wanted to be one of those board members, we would have no objection to that." Mr. Quackenbush then "asked if Mr. Keegan could expect to have an active role and if there was any other, if there was, in quotes, I believe he said a major role, for him to play, and I said there was not."

43. Mr. Quackenbush then asked Mr. Kanas if that was North Fork's best bid. Mr. Kanas responded that "that was our best bid until such time as we would be allowed to go in and examine the books and records of the company and do what is commonly referred to as due diligence. I informed him that there was a team of bank officers out in Melville that were ready to work over that Easter weekend to come in and do that study and that we were prepared to refine our bid and deliver it to them by Monday morning. That would be the day after Easter. And that we were unwilling to raise our price or consider raising our price until such time as we had a chance to look at the books and records."

44. Mr. O'Brien testified that "Mr. Kanas advised me that Mr. Quackenbush pressed him for a higher price and Mr. Kanas expressed our concern with our inability to do due diligence and understand the bank so that we could do that. . . . My recollection is that Mr. Kanas suggested that that was our best price subject to due diligence. . . . Mr. Kanas related to me, he informed Mr. Quackenbush of the exchange ratio that we would be prepared to pay subject to due diligence. Us not knowing more or less than what was publicly available."

45. At one point during their March 27, 1997 conversation, Mr. Kanas explained to Mr. Quackenbush that North Fork views a combination with The Greater as being accretive to earnings. As a result, Mr. Quackenbush pressed Mr. Kanas to improve his bid, and Mr. Kanas declined, relying on the assumption that North Fork's bid included a substantial one-time charge to cover credit related issues. They then discussed the due diligence it would take for Mr. Kanas to

confirm North Fork's assumptions and again what impact the due diligence would have on North Fork's bid. Mr. Kanas at that time stated: "[H]ear me, I'm saying that I've already factored that in so my price won't go down. And [Mr. Quackenbush] said, will it go up? And [Mr. Kanas] said, it won't go down."

46. Mr. Quackenbush told Mr. Kanas that he could expect to hear something from him either over the weekend or, at the latest, by Monday morning.

47. Mr. Quackenbush, who formerly was an attorney with Skadden Arps, took notes of the telephone conversation, but threw them out. Similarly, he took notes at The Greater's March 27, 1997 Board meeting but threw them out. When asked why, he testified: "Because I always do. I do it. It is one of the first things they taught me at Skadden, Arps, which was if you take notes at a meeting . . . handwritten notes I throw out."

48. Defendant Keegan also took notes at The Greater's Board meetings in 1997. They have been either destroyed or thrown out.

49. Mr. Quackenbush reported his conversation with Mr. Kanas to The Greater Board, which had before it an offer from Astoria for a merger in which each common share of The Greater would be exchanged for .4903 of a share of Astoria common stock. The closing price of Astoria common stock on March 27, 1997 was $37.875 per share. Hence, the value of the offer was $18.57 per share, or 4 cents more than North Fork's offer, on a pre-tax basis.

50. The Greater then requested Astoria, to whom full due diligence had been afforded, to increase the exchange value ratio to reflect a value of $19.00 per share based on the closing price of Astoria common stock on March 27, 1997.

51. Astoria agreed to increase the exchange ratio to .5 shares, which had a value of $18.94 based on the closing price of Astoria common stock on March 27, 1997. This was approximately the same value placed on The Greater's shares by North Fork, in the absence of any due diligence. In return,

Astoria was granted the lock-up option to purchase 19.9% of The Greater's common shares.

52. There are no surviving minutes or notes of The Greater's March 27, 1997 Board meeting.

53. On March 29, 1997, at a special meeting of The Greater's Board, the Board unanimously approved the merger with Astoria.

54. There are no surviving minutes or notes of The Greater's March 29, 1997 Board meeting.

55. Mr. Kanas testified in this litigation that:

> North Fork continues to have the same attitude toward this transaction as it expressed many times prior to and then again on March 27 to Quackenbush, and that is, that if an opportunity were to materialize, we would restate our position, that is, given the opportunity to go in and examine the books and records of The Greater we continue to have the same level of interest, at least the same level of interest that we had at that time today.

56. Moreover, Mr. Kanas testified that if North Fork were given the opportunity for due diligence, it would consider making another offer, including a higher offer.

57. Indeed, Astoria paid merely 1.65 times book value for The Greater's shares, compared to the more than 2 times book value paid in the majority of bank acquisitions in the first half of 1997 and the 3.7 times book value which North Fork itself paid in acquiring New York Bancorp in the second half of 1997.

58. On March 31, 1997, PR Newswire reported:

> Astoria Financial Corporation (Nasdaq: ASFC) ("Astoria"), and The Greater New York Savings Bank (Nasdaq: GRTR) jointly announced today that they have entered into a definitive agreement pursuant to which Astoria will acquire The Greater New York Savings Bank ("The Greater"), a $2.5 billion thrift institution,

for a purchase price of $19.00 per common share. Upon completion of the acquisition, The Greater New York Savings Bank will merge into Astoria Federal Savings and Loan Association, Astoria's wholly owned thrift subsidiary. The transaction received the unanimous approval of the boards of directors of Astoria Financial Corporation and The Greater New York Savings Bank.

* * *

Under the terms of the agreement, holders of The Greater common stock will receive either 0.50 shares of Astoria Financial Corporation common stock or $19.00 in cash for each share, pursuant to an election procedure as described in the agreement, subject to 75% of The Greater shares receiving Astoria common stock and 25% receiving cash. The total transaction value is estimated to be $293 million, which is approximately 1.7 times The Greater's tangible book value at December 31, 1996.

* * *

The acquisition will give Astoria its initial presence in Brooklyn. The combined banking operation, with deposits totaling $6.2 billion, will operate 59 banking offices, including in the New York City metropolitan area, 21 in Nassau, 14 in Queens, 9 in Brooklyn, 7 in Suffolk and 3 in Westchester County, and 5 in the upstate counties of Chenango and Otsego. Three additional Brooklyn banking offices are scheduled to open during 1997. No banking office closings are anticipated as a result of the

transaction.

* * *

Commenting on the transaction, George L. Engelke, Jr., President and Chief Executive Officer of Astoria said, "The strategic in-market acquisition of The Greater's banking franchise represents an important complementary fit for us, further strengthening our current banking franchise. In addition to immediately increasing our presence in Queens, Nassau and Suffolk counties, the acquisition of The Greater provides us with a solid entry into the Brooklyn market. The 9 banking offices in Brooklyn have total deposits of $1.3 billion, or an average of $147 million per banking office, representing a 5.4% share of the Brooklyn deposit market, the 4th largest thrift institution market share in a borough with a population of 2.3 million. The pro-forma deposits of the 51 Long Island offices total $5.7 billion, or an average of $112 million per banking office, representing a 5.5% share of a market larger in population than 38 states. We are confident that the transaction will enhance shareholder value and provide long-term benefits for our shareholders, customers and, particularly, the communities that Astoria and The Greater serve. We are also delighted that Gerard Keegan, whose stewardship at The Greater included the development and expansion of their banking franchise, will be joining Astoria as a director and Vice Chairman and Chief Administrative Officer. Jerry's years of banking experience will serve Astoria well as we continue to implement strategies to build our franchise and

enhance shareholder value."

* * *

Gerard C. Keegan, Chairman, President and Chief Executive Officer of The Greater New York Savings Bank, commented, "We are very excited to be joining forces with Astoria, a premier community-oriented financial services institution. This transaction provides significant value to our shareholders and will provide the platform for further enhancing the service we provide to our customers and the communities we operate in. George Engelke is a proven leader dedicated to continuing the community-bank focus we have maintained for 100 years."

59. As reported on Bloomberg News on March 31, 1997, analyst Thomas Theurkauf of Keefe Bruyette & Woods stated: "Greater was something of a plumb. It had big branches and low-cost deposits."

60. On April 1, 1997, Newsday reported:

The deal will give Lake Success-based Astoria entre to the Brooklyn market, where Greater New York has nine branches and more than 5 percent of the borough's deposits.

* * *

"Greater has one of the largest deposits-per-branch ratios in the New York area," said thrift analyst Salvatore DiMartino of Advest Inc. "The deposits per branch in Brooklyn are $150 million. That's the size of some banks."

* * *

At least half of the deposits are in passbook accounts that average $30,000 each and that have remained amazingly stable, even when much higher interest rates could be earned by investing the money elsewhere.

61. As reported in The New York Times on April 1, 1997, Mr. Engelke stated: "The strategic in-market acquisition of the Greater's banking franchise represents an important complementary fit for us, further strengthening our current banking franchise."

62. As reported on April 1, 1997 in The American Banker, Mr. Engelke stated: "The only way to get into Brooklyn was to get there through people who already knew it. We wouldn't get there by going in and opening random branches."

63. On or about June 24, 1997, The Greater and Astoria filed with the SEC their final Joint Proxy Statement/Prospectus pursuant to Section 14(a) of the Securities Exchange Act of 1934 and began disseminating the same to their shareholders on June 25, 1997.

64. The Proxy states:

(a) "On March 17, 1997, Mr. Keegan received a call from the Chief Executive Officer from another banking organization (the "Other Organization") expressing an interest in acquiring [The Greater]."

(b) that the Other Organization proposed a combination conditioned on pooling of interests accounting treatment and consideration consisting of a fixed exchange ratio of the Other Organization's common stock that had a value of $18.53 per share of The Greater common stock based on the closing price of the Other Organization's common stock on March 27, 1997.

(c) "Sandler O'Neill asked the Other Organization to increase its price and it declined to do so."

(d) "[The Greater] Board's review with its

legal and financial advisors of alternatives to the Merger (including its review of the proposal made by the Other Organization and the possibility of remaining independent and growing internally)."

(e) "Subsequently, the chief executive officer of the Other Organization initiated a series of telephone calls with Mr. Keegan and [The Greater Board's] investment bankers, Sandler O'Neill, regarding its interest in [The Greater] and seeking the opportunity to make a proposal regarding a possible business combination with [The Greater]."

(f) "As part of [The Greater Board's] deliberations, it instructed Sandler O'Neill to contact the Other Organization to inquire as to the consideration it would be willing to provide to [The Greater's] shareholders in a combination with [The Greater] and its ability to move expeditiously to sign a definitive agreement with respect to such a transaction."

65. In derogation of their duties and in violation of Section 14(a) and Rule 14a-9, defendants' foregoing statements were misleading because, *inter alia*, they failed to disclose: (i) that the Other Organization was North Fork; (ii) that North Fork owned in excess of 80% of The Greater's Series B Preferred Stock and 625,000 shares of its common stock; (iii) that North Fork had repeatedly requested and was denied the opportunity to meet with defendant Keegan, to make a presentation to The Greater's Board, and to conduct due diligence; (iv) that North Fork was asked if defendant Keegan could expect to have an active or major role to play following the merger and responded that he would not; (v) that North Fork assured The Greater that its offer would not be reduced as a result of any due diligence, effectively placing a collar on any downward potential; (vi) that The Greater had stated that it did not want to talk to North Fork under any circumstances; (vii) that North Fork expressly said that its bid was its best bid only until such time as it would be permitted to conduct due diligence; and (iix) that even if North Fork would have increased its price, The Greater's directors would not have

agreed to a transaction with North Fork.

66. The statements in the next preceding paragraph were false and/or misleading, or misrepresented the true nature of the events, because they falsely and/or misleadingly represented, inter alia: (i) that an anonymous organization without any particularly strong or specific ties or commitment to acquiring The Greater, such as ownership of 80% of The Greater's Series B Preferred Stock and 625,000 shares of its common stock would indicate, was desirous of exploring an acquisition of or business combination with The Greater; (ii) that the anonymous organization proposed to that end a firmly structured pooling of interests transaction, seemingly, and contrary to fact, without any need or desire for due diligence and without any concerted persistence in attempting to get due diligence from The Greater; (iii) that it flatly declined to raise its price when requested to do so, equivalent to a take-it-or-leave-it-bid; (iv) that The Greater and the individual defendants were even-handed and forthcoming with the anonymous organization in providing the appropriate information to the anonymous organization to facilitate and elicit a competitive bid for the Company, when, in fact, they were engaging in the pretense of conducting an auction and were stonewalling an eager bidder; (v) that The Greater and the individual defendants did not stonewall the anonymous organization from pursuing a serious bid worthy of contention and prepared after customary due diligence was provided in good faith, instead of the truth that defendant Keegan misrepresented to North Fork that a strategic combination or merger of The Greater with another bank was not in its plan and stated that he did not want to talk to North Fork under any circumstances, even though he did not know what price North Fork might be willing to offer; (vi) that the Board did not have and did not entertain any proposal that would place any of its members in a position of conflict with those of the public shareholder (by not attempting to advance personal goals over those of the public shareholders, i.e., that North Fork was prepared to equally and comparably consider the future of individual board members, including defendant

Keegan) in connection with the North Fork bid; and (vii) that the Board reviewed these considerations in making its determination to pursue and recommend the transaction with Astoria.

67. Furthermore, the difference between representing that North Fork flatly declined to raise its price and representing that North Fork declined to raise its price because it had been denied access to information which would support additional consideration, makes the proxy misleading because the former intimates that North Fork willingly walked away from any deal, with no desire to pursue a transaction at a higher price, notwithstanding that, in reality, as the latter representation makes clear, North Fork continued to be more than interested in consummating a deal but was deprived unilaterally by The Greater and its directors of the opportunity to enhance its bid by being precluded from conducting due diligence.

68. Moreover, although the Proxy repeatedly discloses that all of the shares of The Greater's Series A Preferred Stock are held by the ESOP Trustee, the foregoing failures are compounded by virtue of the fact that there is no disclosure concerning *who* holds the Series B Preferred, even though the Proxy contains an opinion from Sandler O'Neill that the consideration to be received by the Series B Preferred shareholders is fair to them from a financial point of view. Had this information and the name of the other organization been disclosed, shareholders would have known that the competing bidder was a serious, motivated institution which had the wherewithal and interest to compete on a level playing field.

69. Further, in derogation of their duties and in violation of Section 14(a) and Rule 14a-9, with respect to the statements referred to in paragraph 64 (b)-(c), defendants have failed to disclose that the bid by North Fork was an inherently higher and better bid than Astoria's bid because North Fork's bid was tax neutral and because North Fork's proposed consideration was not static cash or stock, but was reflected in 100% stock which had substantially appreciated in value. This

was so because by failing to identify North Fork, the public shareholders were led to believe that the stock of North Fork to be received in connection with its proposal would carry a constant value of $18.53 per share and would be taxed if market prices continued to rise no matter what. In fact, however:

(a) North Fork's offer was for .486 of its shares for each share of The Greater's common stock;

(b) based upon North Fork's closing price of $38.125 per share on March 27, 1997, the value of its offer on only that date was $18.53 per share;

(c) Astoria's offer was for a combination of 75% stock and 25% cash;

(d) Astoria's stock component had a value of $14.20 per share on March 27, 1997 based upon its closing price of $37.875 on that date;

(e) Astoria's cash component had a pre-tax value of approximately $4.75 (25% at $19.00) and an immediate after tax value of less than that (depending on the individual's tax rate);

(f) Astoria's stock and cash bid had a combined immediately taxable value of no greater than $18.95 ($14.20 plus $4.75), which would inevitably be reduced by taxes. Conversely, North Fork's bid had a total immediate value of a full $18.53 per share;

(g) since March 27, 1997, North Fork's offer materially exceeded the Astoria offer. First, on June 24, 1997, the date of the Proxy, Astoria's stock closed at $45.875 per share, making its offer worth $21.95 per share before the inevitable tax-cut and materially less than that on an after tax basis, compared to the $22.29 per share value of North Fork's offer on that date. Second, on August 29, 1997, immediately preceding the filing of plaintiffs' motion for a preliminary injunction in this action, Astoria's stock closed at $48.125 per share, making its offer worth $22.80 per share before the inevitable tax-cut. In contrast, North Fork's stock, after a two-for-one split closed on August 29, 1997 at $24.937 per share.

Similarly,on September 10, 1997, the date of the preliminary injunction hearing, the values of Astoria's and North Fork's offers were approximately $24 per share and $25.50 per share, respectively. Based upon an after split exchange ratio of .972 shares, North Fork's offer continued to offer richer value to public shareholders than that of the Astoria offer.

70. Put another way, a stock for stock merger, i.e., the one proposed by North Fork, is tax neutral, not tax free. No matter what tax rate is applied to any individual, any stock for stock transaction results in a tax neutral event, unlike the proposed transaction with Astoria. The failure of the proxy to so state is misleading because it implies that any transaction would have some immediate tax consequence, notwithstanding that the North Fork proposal would not.

71. The Proxy Statement also contains a fairness opinion from Sandler O'Neill, adopted by the defendants, that the consideration to be received by the holders of The Greater's common shares and Series B Preferred shares is fair, from a financial point of view, to the holders of such shares.

72. The Sandler O'Neill opinion and the Proxy are false and misleading and in violation of Section 14(a) and Rule 14a-9 because they fail to disclose that a better and higher offer was made or, if due diligence had been provided, would have been made by North Fork. Thus, the statements in the preceding paragraph were false and/or misleading, or misrepresented the true nature of the events, because they falsely and/or misleadingly represent, inter alia, that a fairer, higher price could not be achieved under the circumstances.

DEFENDANTS' ADDITIONAL BREACHES OF THEIR FIDUCIARY DUTIES

73. Plaintiffs incorporate by reference paragraphs 12, 18, 33-38, and 102 of the (First) Amended Complaint as if fully set forth herein.

74. Through the merger agreement with Astoria, which constitutes gross overreaching, deception and manipulation, the individual defendants have violated their fiduciary, common law and statutory duties owed to the Class.

75. In addition to defendants' liability to the Class for the proxy violations hereinafter set forth, plaintiffs, on behalf of the Class, are also entitled to the relief requested because, having decided to sell the Company, the individual defendants who constituted The Greater's Board of Directors were required to, but did not, put it up for auction to the highest bidder, and because the transaction and the acts of defendants in connection therewith, as alleged herein, constitute self-dealing, deception, overreaching and a breach of the fiduciary duties owed to The Greater stockholders by the defendants. As is set forth below, the individual defendants also breached their fiduciary duties to the Company's public stockholders by entering into the breakup fee and lock-up option agreements with Astoria for improper consideration. The breakup fee agreement was, upon information and belief, entered into in violation of law in that it is a penalty and bears no relationship to actual damages that may be suffered.

76. Each of the defendants who were officers and/or directors of The Greater stood in an fiduciary relationship with plaintiffs and the other public shareholders of the Company and owed to The Greater's shareholders the highest duty of loyalty, honesty, good faith, fair dealing, due care and full and candid disclosure in conducting its affairs in a lawful manner. Defendants knowingly, purposefully, deliberately, willfully, culpably, recklessly, or negligently, breached their fiduciary duties to The Greater's shareholders by knowingly, purposefully, deliberately, willfully, culpably, recklessly or negligently committing, causing, permitting to be committed, ratifying, or inducing the acts complained of and misrepresented in the Joint Proxy Statement/Prospectus.

77. In agreeing to the transaction, by not putting the Company up for auction, by not meeting, negotiating with, or providing due diligence to North Fork, and in failing to disclose the material non-public information in their possession as to the true facts leading up to the merger with Astoria, the individual defendants did not act in good faith toward the Class and have breached their fiduciary duties to the Class. Moreover,

defendants through their actions capped the price for which the publicly held shares of The Greater could ever be acquired without taking adequate steps to determine the fair value of such shares. The price paid by Astoria is grossly unfair.

78. Prior to the public announcement of the transaction, the individual defendants did not create a level playing field or act so that the interests of the public stockholders were protected. They engaged in the pretense of an auction, which was not designed to maximize shareholder value and was masterminded to fend off North Fork, a determined bidder.

79. As a result of the foregoing, defendants herein have engaged in, knowingly and substantially assisted in, and aided and abetted each other in breaching their fiduciary duties to the Class.

80. Defendants have violated fiduciary and other common law duties owing to the plaintiffs and the other members of the Class in that they have not exercised independent business judgment, have acted to the detriment of plaintiffs and the other members of the Class in order to benefit themselves, and all defendants have participated in and, substantially and knowingly aided and abetted or induced the aforesaid breaches of fiduciary duty and plan and scheme.

81. As a result of the actions of the defendants, plaintiffs and the other members of the Class have been and will be damaged in that they have not received and will not receive their fair proportion of the value of the Company's assets and business, have been and will be prevented from obtaining a fair price for their common stock, and have been and will be effectively disenfranchised. In sum, plaintiffs and the other class members are immediately threatened by the acts and transactions complained of herein which have and will cause irreparable injury to them.

82. Plaintiffs and the other members of the Class have no adequate remedy at law.

COUNT I

(AGAINST ALL DEFENDANTS FOR VIOLATION OF THE EXCHANGE ACT)

83. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

84. The Joint Proxy Statement constitutes communications to The Greater shareholders under circumstances reasonably calculated to result in the procurement of proxies within the meaning of Exchange Act Rule 14a-1(f), and are therefore solicitations within the meaning of Exchange Act Rule 14a-1(l)(iii).

85. Individually and in concert, the defendants have engaged in a course of conduct pursuant to which they made solicitations by means of the Proxy Statement containing statements that, at the time and in the circumstances under which they were made, were false and misleading and omitted to state material facts necessary in order to make the statements therein not false or misleading.

86. By reason of the foregoing, the defendants have violated Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder.

87. The defendants' conduct has injured and will injure plaintiffs and the other shareholders of The Greater, for which they have no adequate remedy at law.

COUNT II

(AGAINST THE INDIVIDUAL DEFENDANTS FOR BREACHES OF THEIR FIDUCIARY DUTIES)

88. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

89. The individual defendants, singly and in concert, engaged in the aforesaid conduct, breaches of trust, breaches and/or disregard of their fiduciary duties to the Class.

90. Defendants abused the control reposited in them by virtue of their high-level positions in the Company.

91. The Greater's public shareholders have been

and will be injured by reason of the individual defendants' breaches of trust and breaches and/or disregard of their fiduciary duties to the Class. Plaintiffs, as shareholders of The Greater and representatives of The Greater shareholders similarly situated, seek damages and other relief as hereinafter set forth.

COUNT III
(AGAINST THE ASTORIA DEFENDANTS)

92. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

93. Astoria Financial Corp. and Astoria Federal Savings and Loan Association at all relevant times knew that the individual defendants owed to plaintiffs and the Class fiduciary duties.

94. The breaches of trust and fiduciary duties by the individual defendants were conducted with the knowledge, encouragement, and direct and indirect participation of the Astoria defendants.

95. Astoria Financial Corp. and Astoria Federal Savings and Loan Association induced the individual defendants' breaches of trust and breaches of fiduciary duties to the Class.

96. Astoria Financial Corp. and Astoria Federal Savings and Loan Association are liable to plaintiffs and the Class for the damages which they have suffered.

COUNT IV
(AGAINST THE INDIVIDUAL DEFENDANTS
FOR COMMON LAW FRAUD)

97. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

98. The defendants have engaged in a plan, scheme and unlawful course of conduct, pursuant to which (a) they knowingly engaged in acts, transactions, practices, and course of business which operated as a fraud on plaintiffs and the Class and (b) made to plaintiffs and the Class various untrue

statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The purpose and effect of defendants' material omissions and misstatements was to induce plaintiffs and the Class to vote their proxies in favor of the merger with Astoria and to consent to the acquisition of their Greater shares by Astoria upon unfair terms.

99. Defendants' fraudulent course of conduct and materially false representations and omissions induced members of the Class to vote their proxies in favor of the merger with Astoria.

100. Had members of the Class known the truth concerning the matters complained of herein, they would not have voted their proxies in favor of the merger with Astoria.

101. Moreover, by reason of defendants' fraudulent course of conduct and materially false representations and omissions, members of the Class were induced to sell their Greater shares upon the open market, believing that Astoria's bid was the highest and best bid, not knowing that North Fork was not provided due diligence, that there was no level playing field, and that North Fork was willing to consider raising its bid if it were provided due diligence.

102. By reason of defendants' conduct, plaintiffs and the Class have been damaged.

103. By reason of defendant' malicious, wanton and wilful fraud, which constitutes gross and morally reprehensible conduct plaintiffs and the Class are entitled to punitive damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment and relief against defendants and each of them as follows:

(1) Granting plaintiffs and the Class rescission;

(2) Awarding to plaintiffs and the Class compensatory and punitive damages;

(3) Declaring that the defendants herein, and each of them, have violated Section 14(a) of the Exchange Act and

Rule 14a-9 promulgated thereunder;

(4) Declaring that the individual defendants have committed breaches of trust and breaches of their respective fiduciary duties owed to The Greater's shareholders;

(5) Declaring this action to be a proper class action and certifying the plaintiffs as class representatives;

(6) Awarding plaintiffs the costs and disbursements of this action and reasonable attorneys' and expert's fees; and

(7) Awarding such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury of all issues so triable.

Dated: August 5, 1998

S/_____

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Supreme Court, U.S.
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(2)

No. 00-1035

IN THE

Supreme Court of the United States

LEONARD MINZER, *et al.*,

Petitioners,

v.

GERALD C. KEEGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a petition seeking to challenge a unanimous decision of the Court of Appeals for the Second Circuit should be granted where there is no split among the Circuits, no conflict with this Court's decisions and no important issue of federal law at stake.

2. Whether a unanimous panel of the Second Circuit erred in affirming the dismissal of petitioners' second amended (and "corrected") complaint alleging proxy violations where:

   a. there was no causal link between approval of the challenged merger transaction and the loss alleged by petitioners; and

   b. the alleged omissions in the proxy statement were immaterial under this Court's probability/ magnitude test for the materiality of merger discussions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents make the following corporate disclosure statements:

- Respondent Astoria Financial Corporation is the parent company of and owns 100% of the stock of respondent Astoria Federal Savings and Loan Association.

- Respondent The Greater New York Savings Bank was merged with and into respondent Astoria Federal Savings and Loan Association on or about September 30, 1997.

- Respondents are not aware of any other parent or publicly held companies that own 10% or more of the stock of any corporate respondent.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 78u-4), provides in relevant part:

§ 78u-4. Private securities litigation.

* * *

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant —

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

The complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and

belief, the complaint shall state with particularity all facts on which that belief is formed.

* * *

(3) Motion to dismiss; stay of discovery.

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

* * *

(4) Loss Causation.

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.

COUNTER-STATEMENT OF THE CASE

1. Introduction

This is a classic strike suit — precisely the type of case that the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "Reform Act"), was designed to purge from the federal court system.

After filing breach of fiduciary duty claims in state court immediately following announcement of the merger transaction at issue, petitioners subsequently filed a federal court action challenging certain disclosures in the joint proxy statement issued by respondent banks. The main federal allegations concerned statements relating to a rejected merger proposal made by another bank. Based on erroneous assumptions of a purported state law duty to conduct an "auction" and sell the bank to the highest bidder, petitioners alleged that the approval of the merger transaction caused them to lose the speculative possibility of a more favorable transaction with the rejected bank.

Petitioners are wrong. There was no state law duty to auction the bank nor to negotiate with another bidder. Indeed, the proxy statement fully disclosed the fact that there was no auction and that higher offers from third parties would potentially be foreclosed by the terms of the merger agreement. Moreover, petitioners alleged that the respondent board members would never have agreed to any merger whatsoever with the unwanted suitor. Petitioners now refuse to recognize what a unanimous panel of the Second Circuit made plain in an opinion authored by its Chief Judge — that there is no causal relationship between the shareholders' overwhelming approval of the merger and the purely

speculative "loss" alleged by petitioners. The validity of this proposition became more evident when in response to petitioners' petition for panel rehearing and suggestion for rehearing en banc, which raised the same arguments presented here, not a single judge of the entire Second Circuit requested that a vote be taken thereon.

2. Procedural History

On March 31, 1997, The Greater New York Savings Bank ("The Greater") and Astoria Financial Corporation ("Astoria") jointly announced that their respective boards of directors had agreed to a merger at a significant premium to The Greater's historic trading value. (*See* 48a, ¶ 3[1]) Within seventy-two hours, respondents filed suit in New York State court alleging that The Greater's board breached its fiduciary duty to The Greater's shareholders by failing to conduct an auction. (5a-6a) This complaint was ultimately dismissed without prejudice by stipulation of the parties. (6a)

On July 18, 1997, petitioners filed their initial complaint in the United States District Court for the Eastern District of New York alleging proxy violations under Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder. Those allegations related to information disclosed in a joint proxy statement/prospectus (the "Proxy") about a less favorable merger proposal received by The Greater from North Fork Bancorporation, Inc. ("North Fork"), which The Greater had previously rejected. Petitioners also reiterated their state law "failure to conduct an auction" fiduciary duty claims. (*See* 7a; 28a)

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1. Parenthetical references to a number followed by a lower case "a" are to the page(s) of the appendix to the Petition For A Writ Of Certiorari (hereinafter, "Petition").

Respondents moved to dismiss the complaint for, among other reasons, petitioners' failure to comply with the Reform Act's pleading requirements. (*See* 7a) The District Court reserved decision and granted petitioners' application to lift the Reform Act's mandatory stay of discovery. (*See* 7a)

Despite their allegations of improper disclosure, petitioners made no attempt to enjoin the shareholder vote on the merger. (*See* 28a) On or about August 1, 1997, more than 97% of The Greater's shareholders that voted — including North Fork itself — approved the merger. (*See* 48a-49a; *Minzer v. Keegan*, No. 97-CV-4077 (CPS), 1997 U.S. Dist. LEXIS 16445, at *11 & n.4 (E.D.N.Y. Sept. 22, 1997)) Although: (a) they had already filed a complaint challenging the proxy disclosures, and (b) the Proxy advised them that they had the right to dissent and seek an appraisal, petitioners chose not to exercise these state law rights.

a. Petitioners Obtain Discovery From The Key Players And Amend Their Complaint Based Thereon

Petitioners subsequently amended their complaint based on the substantial document and deposition discovery they conducted (7a-8a), and included selected quotations from the deposition transcripts in their amended complaint. (*E.g.*, 49a-50a, ¶ 4(b)) The gravamen of petitioners' amended complaint was that, in stating that North Fork declined to raise its bid, the Proxy did not disclose that North Fork was not given the same opportunity as Astoria to conduct due diligence. (*See* 60a-61a, ¶¶ 38-39) Erroneously alleging that The Greater had a state law duty to auction itself to the highest bidder (74a, ¶ 75), the complaint further speculated that had North Fork done due diligence, it *might* have made a revised,

higher offer. But even so, petitioners asserted, The Greater would have rejected any revised offer because it did not want to merge with North Fork under any circumstances. (69a, ¶ 65; 73a, ¶ 72) There was no allegation — nor could there be — that North Fork actually made a revised offer higher than the one already disclosed in the Proxy.

b. Petitioners' Motion To Enjoin The Merger Is Denied And The Transaction Is Consummated

On or about September 2, 1997, petitioners moved for a preliminary injunction to enjoin the merger. After an evidentiary hearing, which included testimony from the Chairman and CEO of North Fork and other key witnesses, then-Chief Judge Charles P. Sifton denied the motion because, among other things, petitioners had failed to show a likelihood of success on the merits. *See Minzer v. Keegan*, No. 97-CV-4077 (CPS), 1997 U.S. Dist. LEXIS 16445 (E.D.N.Y. Sept. 22, 1997). The merger transaction was consummated on September 30, 1997 and all The Greater's shareholders, including petitioners, realized a substantial premium for their shares. (48a-49a, ¶ 3)

c. The District Court Dismisses The First Amended And Second Amended (And Then "Corrected") Complaints

In November, 1997, respondents moved to dismiss the first amended complaint. On June 1, 1998, having rejected as frivolous petitioners' arguments that the Reform Act was inapplicable to their complaint, the Court granted respondents' motion to dismiss based on, among other things, petitioners' failure to comply with the pleading requirements of the Reform

Act and their failure to state a claim for a proxy violation. *See Minzer v. Keegan*, No. 97-CV-4077 (CPS) (E.D.N.Y. June 1, 1998).

On July 1, 1998, petitioners again amended their complaint, this time purportedly to comply with the pleading requirements of the Reform Act. (48a, ¶2) The vast majority of the allegations in this "new" pleading, however, were identical to those dismissed in the first amended complaint. On July 21, 1998, respondents moved to strike and/or dismiss petitioners' second amended complaint. (29a) On August 5, 1998, petitioners effectively amended their complaint for a third time when they submitted a "corrected" second amended complaint to the District Court. (47a)

On January 25, 1999, the District Court dismissed the second amended (and "corrected") complaint because petitioners once again failed to, *inter alia*, state a claim for a proxy violation. (*See* 18a-44a) As it had previously in dismissing the first amended complaint, the District Court properly held that under the facts alleged by petitioners, the purported omissions concerning North Fork's merger overtures were not material under the probability/magnitude test this Court established in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). (*See* 36a-38a)

The District Court also dismissed petitioners' claim regarding an allegedly misleading fairness opinion issued by Sandler O'Neill & Partners, L.P., The Greater's financial advisor ("Sandler O'Neill").[2] Having dismissed petitioners' federal claims, the District Court in its sound discretion declined to exercise supplemental jurisdiction over petitioners' state law "duty to auction" claims. (42a-43a)

2. Contrary to the suggestion in the Petition at page 21, the complaint did *not* assert a claim for relief against Sandler O'Neill, which has never been a defendant in the action.

d. The Second Circuit Affirms The Dismissal And Rehearing Is Denied

The District Court's decision was affirmed by a unanimous panel of the Second Circuit. (*See* 1a-17a) Writing for the panel, Chief Judge Winter found that even if the alleged omissions concerning North Fork's merger overtures were material, a point it did not decide, under the peculiar facts alleged by petitioners there was no causal link between the alleged omissions and the alleged injury. (2a; 10a-13a) The Second Circuit also found that petitioners failed to allege any provable facts that would render Sandler O'Neill's fairness opinion false or misleading.[3] (13a-15a) A petition for panel rehearing and suggestion for rehearing en banc was denied. (45a-46a)

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3. Although the Second Circuit did not resolve the issue, it is clear that the second amended (and "corrected") complaint still does not comply with the pleading requirements of the Reform Act. *See* 15 U.S.C. § 78u-4(b)(1); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000) (affirming dismissal of Rule 14a-9 complaint for failure to comply with (b)(1) pleading requirements).

Petitioners' second amended (and "corrected") complaint — their fourth pleading in this action — is a jumble of confusing and contradictory allegations that impermissibly saddled defendants, then the District Court, then the Second Circuit and now this Court with the burden of attempting to decipher it. It is precisely the type of pleading that the Reform Act was designed to eliminate from the federal docket — a scattershot of allegations made in the hope that something will stick, so that undeserving shareholders can extract a settlement payment from an innocent company seeking to avoid the high costs of litigation. *See* S. REP. No. 104-98, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 689 ("Our economy does not benefit when strike suit artists wreak havoc on our Nation's boardrooms and deter capital formation.").

REASONS FOR DENYING THE WRIT

Petitioners have wasted enough judicial resources pressing their meritless disclosure allegations. In the substantial proceedings below, petitioners received every consideration and opportunity to properly plead a valid claim under the federal securities laws — they simply could not do so.

None of the compelling reasons that warrant this Court to grant a writ of certiorari are present in this case. There is no split among the Circuits, no conflict with the relevant decisions of this Court and no significant legal issues crying out for resolution by this Court.

THE SECOND CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS IN *MILLS*, *VIRGINIA BANKSHARES* AND *BASIC*

The Second Circuit held that petitioners failed to state a claim for a proxy violation because the alleged omissions, if corrected, would not cause shareholders to be any less likely to approve the objected-to transaction. Petitioners claim that holding contradicts this Court's reasoning in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and also argue that it was improper for the Second Circuit, rather than a jury, to make that determination. (Petition at pp. 10-15, 17-19.) Both these arguments are without merit. Moreover, this Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), further demonstrates that the alleged omissions are not actionable.

a. The Second Circuit's Decision Follows This Court's Reasoning In *Mills*

The *Mills* causation rule was designed to relieve a class of shareholders from the difficult burden of proving whether the materially misleading provisions of a proxy had a decisive effect on shareholder voting where, as was the case in *Mills*, the approval of the challenged transaction was the injury about which the shareholders complained. *See Mills*, 396 U.S. at 384-85. Thus, this Court held that, where there is a material omission, causation between the proxy violation and the challenged merger is presumed so long as the proxy was an "essential link" to the harm (*i.e.*, the merger itself). *Id.* at 385.

Here, unlike in *Mills*, the injury complained of is not the approval of the challenged merger itself. Rather, petitioners complain of the "loss" of the speculative possibility of a more beneficial merger opportunity with North Fork, which they erroneously allege The Greater's board had a duty to negotiate and ultimately accept. There was, however, no duty to auction The Greater, negotiate with North Fork nor to provide North Fork with due diligence. State law leaves these decisions to the sound discretion of the board of directors, not the shareholders.[4] (*See* 12a-13a).

Petitioners alleged that The Greater's board would not have agreed to a merger with North Fork, even if North Fork had

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4. In the sense that the "loss" would have occurred regardless of the misleading proxy because the objecting shareholders were powerless to stop it, this case is similar to *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), where controlling shareholders had enough votes to approve the objected-to transaction without seeking the minority shareholders' votes. (*See* 11a)

increased its bid after a due diligence review. (69a-70a, ¶ 65) Given this allegation, even assuming petitioners' highly speculative scenario had been disclosed in the Proxy, those disclosures could never have resulted in the benefit petitioners complained they were deprived of (*i.e.*, a merger with North Fork at a higher price). Accordingly, as the Second Circuit correctly recognized, there was no causation as a matter of law. *See Burke v. Jacoby*, 981 F.2d 1372, 1379-80 (2d Cir. 1992) (affirming grant of summary judgment because there was no causation where shareholder would not have changed her vote or dissented had she known omitted information, whether or not it was material); *see generally Grace v. Rosenstock*, 228 F.3d 40, 47 (2d Cir. 2000) ("[B]oth loss causation and transaction causation must be proven in the context of a private action under § 14(a) of the 1934 Act and SEC Rule 14a-9 promulgated thereunder."); *AUSA Life Insurance Co. v. Ernst and Young*, 206 F.3d 202, 216 (2d Cir. 2000).[5] Moreover, as the Second Circuit found, petitioners remain free to seek to litigate all of their breach of

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5. Many other Circuits follow this causation requirement. *See The Ambassador Hotel Company, Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1027 (9th Cir. 1999) ("The causation requirement can be broken down into two necessary elements: actual cause, or transaction causation; and proximate cause, or loss causation."); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) (same); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997) (same); *Gasner v. Board of Supervisors of the County of Dinwiddie, Virginia*, 103 F.3d 351, 360 (4th Cir. 1996) (same). And although not expressly relied upon by the Second Circuit, its decision is also consistent with the causation provision contained in the Reform Act. *See* 15 U.S.C. § 78u-4(b)(4) ("In any action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.").

fiduciary duty claims against The Greater's board in the New York State courts.[6](15a-16a)

The Second Circuit's decision does not, as petitioners contend, "threaten to undermine the well-functioning system of corporate suffrage." (Petition at p. 10) On the contrary, the decision below is based upon traditional principles of causation as applied to the highly particularized and unique facts of this case. There is no compelling reason for this Court to grant the petition.

b. Under The Peculiar Facts Alleged, The Question Of Causation Was Appropriately One Of Law For The Court

The Second Circuit properly assumed all facts in the second amended (and "corrected") complaint to be true and gave petitioners the benefit of all reasonable inferences. It was also entitled to rely on the entirety of the Proxy (3a) and did not have to accept petitioners' speculations, deductions or legal conclusions as true. *See, e.g., United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir. 1989); 2 JAMES WM. MOORE ET AL., MOORE'S

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6. Petitioners' assertion that "a state remedy was allegedly lost as well" (Petition at p. 16 & n.8) is disingenuous at best. They coyly state that they claimed in the proceedings below that "the misleading proxy solicitation led *absent* class members to forego their right to seek an appraisal. . . ." (Petition at p. 16 & n.8 (emphasis added).) Assuming that a loss of state appraisal rights could provide a basis for causation — a question left open in *Virginia Bankshares*, *see* 501 U.S. at 1107, there is no allegation *in the complaint* that petitioners or any other class members forewent their appraisal rights as the result of a misleading proxy. (15a) Therefore, even if true, this question is not properly before this Court.

FEDERAL PRACTICE § 12.34 [1][b] (3d ed. 2000). Where, as here, the facts are undisputed and are susceptible of only one reasonable inference, the question of causation is one of law for the Court and should not be submitted to a jury. *See Grace*, 228 F.3d at 49-50 (affirming district court's dismissal of false and misleading proxy claims because plaintiffs failed as a matter of law to prove causation); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing district court and stating that "[b]ecause plaintiffs failed to support an essential element of their 10b-5 claim, loss causation, the district court erred in denying [defendant's] motion for judgment as a matter of law."); *see generally* 57A AM. JUR.2D *Negligence* § 446 (1989).

Based on the facts alleged in the second amended (and "corrected") complaint, it was perfectly proper for the Second Circuit to conclude that even if a reasonable shareholder knew of the omitted facts regarding North Fork, he would have been no less likely to approve the Astoria merger. (*See* 11a-13a) The inference petitioners asked the Second Circuit to accept — that a reasonable shareholder would "believe . . . that there was a substantial likelihood of a near-term and more favorable merger with North Fork after rejection of the Astoria merger" (11a) — is, as the court below found, unreasonable and based purely on speculation. (*See* 11a-13a)

Now, petitioners ask this Court to accept as true their wild speculation that, if further disclosure had been made, North Fork might have launched a hostile tender offer or waged a lengthy proxy contest to replace The Greater's board with directors who would look more favorably upon North Fork's acquisitive overtures. (Petition at p. 18) North Fork, however, was itself a Greater shareholder and recipient of the

Proxy. It was fully aware of the information petitioners claim should have been disclosed and, nonetheless, voted in favor of the Astoria merger. North Fork's knowing conduct belies petitioners' unfounded prediction. Rhetorical flourishes in an advocate's petition, such as those presented here, are no substitute for well-pleaded allegations of fact in a complaint, and no court is required to accept them as true. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) ("Under Rule 12(b)(6), 'the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.' "). Under these circumstances, there was nothing for a jury to decide, and dismissal of the case was appropriate. *See generally Grace*, 228 F.3d at 46 ("In framing the contours of private rights of action implied under the [Exchange] Act, the courts have sought to exclude, as a matter of law, claims based on hypothetical circumstances or speculation.").[7]

c. Dismissal Of The Second Amended (And "Corrected") Complaint Is Also In Accord With The Rationale in *Basic*

In *TSC Industries, Inc. v. Northway, Inc.*, this Court stated that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it

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7. Petitioners' remaining arguments concerning the dismissal of their claims of a misleading fairness opinion are wholly without merit. (*See* Petition at pp. 21-22.) The Second Circuit correctly noted that while a statement that a merger is fair could be actionable, petitioners did not allege "provable" facts to support their claim. (14a-15a); *cf. Virginia Bankshares*, 501 U.S. at 1093. Its decision is correct and does not present any issue warranting this Court's review or meriting further discussion here.

important in deciding how to vote," 426 U.S. 438, 449 (1976), and, in other words, that " 'the defect have a significant propensity to affect the voting process.' " *Id.* (quoting *Mills*, 396 U.S. at 384).

Subsequently, in *Basic*, this Court held that the materiality of merger proposals depends " 'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.' " *Id.* at 238 (quoting *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc)). This Court stated: "[I]n order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels." *Id.* at 239.

Here, the allegedly omitted fact was the mere speculative possibility that North Fork's offer *might* (as opposed to definitely would) increase after due diligence. As the District Court found, the nondisclosure of this theoretical possibility could not be material because petitioners' allegations make clear that The Greater was not interested in merging with North Fork under any circumstances. (37a-38a) Accepting petitioners' allegations as true, as the Court must on a motion to dismiss, demonstrates that the probability of The Greater merging with North Fork was zero. Hence, *Basic* mandates that, as a matter of law, the alleged omission regarding North Fork was immaterial.[8]

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8. The District Court's conclusion in this regard is consistent with the conclusions reached by several other courts. *See Panfil v. ACC Corp.*, 768 F. Supp. 54, 58-59 (W.D.N.Y.) (granting motion to dismiss because there was no probability of merger transaction), *aff'd*, 952 F.2d 394 (2d Cir. 1991); *Taylor v. First Union Corporation of* (Cont'd)

This Court's analysis in *Basic* is another compelling reason why the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Cont'd)
South Carolina, 857 F.2d 240, 244-45 (4th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (reversing jury verdict and directing judgment in favor of defendants because merger discussions were contingent and speculative); *cf. Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1317-18 (W.D. Mich. 1978) (cited approvingly in *Basic*, 485 U.S. at 240 & n.19) (granting summary judgment and dismissing complaint alleging misleading statements under section 14(e) of Exchange Act; "Because such [acquisition] overtures were not firm offers they should not be deemed material information required to be disclosed under Section 14(e).").

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No. 00-1035

In the

Supreme Court of the United States

LEONARD MINZER and HARRY SCHIPPER, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GERALD C. KEEGAN, PHILIP F. RUPPEL, GEORGE H. SORTER, GWENDOLYN CALVERT BAKER, WILLIAM F. DE NEERGAARD, JAMES G. PEEL, C. STEPHEN CONNOLLY, WILLIAM F. WARD, NICHOLAS A. MARSHALL, PETER C. HAEFFNER, JR., GREATER NEW YORK SAVINGS BANK, ASTORIA FINANCIAL CORP., ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION, and ASTORIA FEDERAL SAVINGS & LOAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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In their opposition brief, respondents introduce a new and unfounded legal characterization of the facts underlying this litigation to which we must respond.

This case is about The Greater New York Savings Bank's ("The Greater") material misrepresentations and omissions in a proxy statement seeking - and procuring - shareholder approval for the merger between it and Astoria Financial Corporation ("Astoria"). It is not about petitioners' (or any other shareholders') pursuit of a better and higher offer from North Fork Bancorporation, Inc. ("North Fork"). Petitioners claim that The Greater's shareholders were misinformed by a materially false and misleading proxy statement, and seek redress for this violation of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder. The prayer for relief expressly seeks, in plain English, a declaration that defendants violated Section 14(a), a grant of rescission, other appropriate equitable relief, and monetary damages, among other things (Petition 78a-79a).

The thrust of this Petition is that the Second Circuit's decision flies in the face of *Mills v. Electric-Auto-Lite Co.*, 396 U.S. 375 (1970), and seriously undermines Section 14(a)'s guarantee of fair corporate suffrage by freeing corporations and their officers and directors from explaining to their shareholders the true nature of the questions for which the shareholders' vote is sought in a wide range of merger and acquisition transactions. The decision disrupts what had been a settled body of law after *Mills*.

Recognizing that there is no basis upon which to distinguish this case from *Mills*, it is not surprising that respondents make no effort to justify the novel reasoning relied upon by the Second Circuit – *i.e.*, that causation is lacking because the Second Circuit believed that shareholders would have voted the same even had the truth been told. 218 F.3d at 145. Instead, respondents now resort to a completely different

tack and invoke the entirely distinct and inapposite doctrine of "loss causation." They say that "[h]ere, unlike *Mills*, the injury complained of is not the approval of the challenged merger itself. Rather, petitioners complain of the 'loss' of the speculative possibility of a more beneficial merger opportunity with North Fork...." Opposition Brief at 10. They argue that this loss is too speculative to be the basis for an award of damages, and thus that the case should be dismissed on the pleadings.[1]

Respondents have mischaracterized petitioners' claims. Petitioners *do* challenge the approval of the merger by The Greater's shareholders: nothing more, nothing less. Petitioners' complaint seeks whatever relief, equitable or otherwise, is appropriate in light of the denial of the fair corporate suffrage accomplished through defendants' violations of the proxy rules. As *Mills* makes clear, that relief may include, but is not limited to, monetary damages. 396 U.S. at 386.

With respect to damages, petitioners have never insisted on or limited their claim to an amount of money damages calculated solely by reference to the foregone opportunity presented by North Fork.[2] Fully consistent with the doctrine of

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[1] In support of this argument, respondents *allege* the "counter-fact," among others, that North Fork itself voted for the Astoria merger. This type of reverse pleading undermines the very refrain upon which respondents seek to rely – courts may not accept as true anything but the well pleaded facts contained in the complaint. No allegation concerning the voting of North Fork's shares is made in the complaint here and, therefore, was not relied upon or even mentioned in the Second Circuit's opinion. Moreover, discovery showed that North Fork's approval of the merger was ministerially and inadvertently granted, and that, had the proxy been shown to North Fork's chairman, he would have voted against the merger. Accordingly, it is improper to consider North Fork's merger vote in determining the merit of this appeal.

[2] Damages could, for example, be calculated simply by reference to a "fair" value above that offered by Astoria, on which North Fork's interest would be probative.

loss causation, petitioners only seek compensation for losses that flow directly from the misrepresentation – here, the approval of the merger with Astoria for less than fair value. If a measure of damages is eventually considered that takes into account North Fork's offer as a measure of fair value, respondents will have the opportunity to argue their point about the power of The Greater's management to ignore it. But to cut short the consideration of any remedy based on an argument about the causal nexus between petitioners' claim and one possible way of computing damages is wrong. *Mills* says that a case like this should move forward, not be terminated, once there is a showing of a material misrepresentation in the proxy statement. No case cited by respondents suggests otherwise. At this stage, petitioners ask simply for the ability to show the violation and seek whatever relief is appropriate.

Respondents also briefly argue lack of materiality – the issue the Second Circuit expressly declined to reach because of its erroneous holding on causation. As stated in our Petition, the misstatements and omissions in the proxy statement are material. Whatever the attitude of The Greater's management toward North Fork, shareholders would likely have considered significant the complete truth regarding North Fork's willingness to offer more than Astoria because that goes directly to the question of the value of The Greater and, hence, whether the proposed inferior merger was worth voting for. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a case in which this Court expanded the scope of materiality under the securities laws, says nothing that could be read to suggest an absence of materiality here. The Greater obviously saw North Fork's overture as significant enough to its shareholders to describe in the proxy statement. Their legal obligation was to describe it accurately, which they did not do. As suggested in the Petition, however, this issue should be resolved by the court of appeals and need not be considered by this Court. Petition at 10-11

n.6.[3]

For the foregoing reasons and the reasons stated in the Petition, the writ of certiorari should be granted.

Dated: February 5, 2001

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[3] Respondents improperly push aside petitioners' claim of causation predicated on the loss of shareholders' state court right to appraisal on the ground that there is no allegation in the complaint that any shareholder forewent appraisal rights. Opposition Brief at 12 n.6. However, as respondents plainly concede by not citing to any authority in support of this argument, there is no requirement to plead causation of the loss of a state remedy in the complaint.

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